Jurisdictional Statement

Nos. ... 81-561

IN THE

Supreme Court of the United States

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October Term, 1981

FRANK WILLIAM GAY; LEVAR BEEBE MYLER; and JOHN MORRISON HOLMES, JR.,

Appellants,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE; FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIR CORP., d/b/a Hughes Airwest; and HUGHES PROPERTIES, INC.,

Appellees.

HOWARD LORENZO ECKERSLEY; JAMES H. RICKARD; and WILBUR SUTTON THAIN, M.D.,

Appellants,

vs.

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIR CORP., d/b/a Hughes Airwest; HUGHES PROPERTIES, INC.; THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE J. CHARLES THOMPSON, District Judge, Eighth Judicial District Court,

Appellees.

On Appeal from the Supreme Court of Nevada.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Whether the Fourteenth Amendment to the Constitution of the United States is violated by Nevada statutes and rules of procedure, interpreted and applied so as to prevent consideration, at any stage of the proceedings, of all evidence adduced by non-resident defendants to establish, through impeachment of the plaintiff's evidence and as direct evidence, that the Nevada court lacks personal jurisdiction over them.

2. Whether the Fourteenth Amendment to the Constitution of the United States is violated by Nevada statutes and rules of procedure, interpreted and applied so as to permit a plaintiff to repeatedly serve and repeatedly force a non-resident defendant to litigate the issue of the Nevada court's jurisdiction of his person and yet be forever bound by the first jurisdictional ruling adverse to him.

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Appellees.

JURISDICTIONAL STATEMENT.

Opinions Below.

The opinion of the Supreme Court of the State of Nevada is reported at 97 Nev. Adv. Op. 115, 629 P.2d 1209 (1981) and is reprinted in Appendix A, *infra*, at pp. A-1 through A-10. The Writ of Mandate and Notice in Lieu of Remittitur issued in accordance therewith, are set forth in Appendix A, *infra*, at pp. A-23 through A-24. The opinion of the trial court, the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, was given orally from the bench, and is contained in the Reporter's Transcript of Proceedings set forth in Appendix A, *infra*, pp. A-11 through A-17. The trial court's Orders thereon are set forth in Appendix A, *infra*, at pp. A-18 through A-22.

Jurisdiction.

The proceedings below in the Supreme Court of Nevada were on mandamus petitions to review the decision of the trial court, the Eighth Judicial District Court of the State of Nevada, concerning a motion to quash service filed by appellants. The motion to quash had been granted as to appellants Gay, Myler and Holmes and denied as to appellants Eckersley, Rickard and Thain. The Supreme Court of Nevada determined that the trial court had jurisdiction over all of the appellants and that the motion to quash should have been denied as to all of them.

The opinion of the Supreme Court of Nevada was entered June 26, 1981 and its mandate thereon was entered July 30, 1981. Two notices of appeal, one filed by appellants Gay, Myler and Holmes, and the other filed by appellants Eck-

ersley, Rickard and Thain, were filed on August 3, 1981 and duly served on all necessary parties. This jurisdictional statement is filed in support of both of those appeals.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws in question the validity of Nev. Rev. Stats. § 14.065 and Nev. R. Civ. P. 12(b), as applied, on grounds that they are repugnant to the Constitution of the United States.

The appeals are taken from a judgment of the Supreme Court of Nevada, upholding the Nevada trial court's interpretation and application of Nev. Rev. Stats. § 14.065, the state's "long-arm" statute, and Nev. R. Civ. P. 12(b), its rule governing special appearances. Two distinct rulings of the Supreme Court of Nevada are at issue. First, the court held that *in personam* jurisdiction over appellants was established, pursuant to Nev. Rev. Stats. § 14.065, based upon a purported "prima facie" showing of jurisdiction by appellees without consideration of appellants' substantial contrary showing, despite the fact that under Nevada procedure this will be appellants' only opportunity to have this issue determined. Second, the court upheld the trial court's ruling that the granting of a previous motion to quash filed by appellants was not dispositive of the jurisdictional issue.

This case is directly appealable under 28 U.S.C. § 1257(2) because it involves a challenge to the validity of a statute "as applied" to the particular facts of appellants' case. Many decisions of this Honorable Court have held it sufficient, for purposes of appeal jurisdiction, to challenge the validity of a statute "as applied" to a particular set of facts. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686 n.1 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 721 (1961).

Here, Nev. Rev. Stats § 14.065 and Nev. R. Civ. P. 12(b) have been interpreted and applied to appellants in violation of their due process rights. Since the Nevada statute and rule require (1) only a prima facie showing of jurisdictional facts, and (2) that the court disregard competent evidence adduced by non-resident defendants on the jurisdictional question, they raise a substantial due process issue when applied to *any* non-resident litigant. Moreover, the statute and rule are unconstitutional as applied to these appellants, in particular, because of the trial court's previous ruling upholding appellants' motion to quash service. The Nevada courts' allowance of subsequent services of process and relitigation of the jurisdictional issue violates appellants' due process right against subjection to excessive state assertions of in personam jurisdiction.

The Nevada Supreme Court was faced squarely with the issue of whether the trial court's interpretation and application of Nev. Rev. Stats. § 14.065 and Nev. R. Civ. P. 12(b) violated the due process clause. The constitutional challenges were explicitly raised in appellants' papers submitted to that court. The Nevada Supreme Court made a final ruling, without even addressing appellants' substantial constitutional challenges, that appellants were properly subject to the trial court's personal jurisdiction and that the lower court had correctly interpreted and applied Nevada's procedure. Thus, the Nevada Supreme Court has unambiguously upheld the validity of the statute and rule drawn into question.

Although the Nevada Supreme Court has remanded this case to the trial court for further proceedings, its judgment fully satisfies the general criteria for finality set forth by this Court in *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); and *Cox*

Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Its ruling is binding upon the trial court and not subject to further review in Nevada. The decision of the Nevada court seriously erodes federal policy, *i.e.* the due process right against subjection to excessive state assertions of in personam jurisdiction. The federal claims presented for review are fundamental to the case. They are separate, however, from the issues still to be determined in the state court trial and are not enmeshed in the factual controversies of the case. Finally, determination of appellants' due process claim may avoid a long and costly trial and subsequent appeals.

Moreover, this case is identical to the state supreme court rulings regarding constitutional challenges to *in personam* jurisdiction that have been found "final" within the meaning of 28 U.S.C. § 1257 by this Honorable Court. *The General Counsel on Finance and Administration, United Methodist Church v. Superior Court*, 439 U.S. 1369 (1978) [opinion by Rehnquist, J., in chambers] [dictum]; *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1, 15 L.Ed.2d 39 (1965) [opinion by Goldberg, J., in chambers].

Should this Honorable Court nonetheless consider a direct appeal to be an inappropriate mode of review, appellants respectfully request that the Notices of Appeal and this Jurisdictional Statement be regarded and acted upon as Petitions for Writs of Certiorari and Brief in support thereof pursuant to 28 U.S.C. § 2103.

Constitutional Provisions, Statutes and Rules Involved.

The appeal involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, Nev. Rev. Stats. § 14.065, and Nev. R. Civ. P. 12(b), each of which is quoted below.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment to the Constitution of the United States, Section 1.

"Personal service of process on party outside state.

1. Personal service of summons upon a party outside this state is sufficient to confer upon a court of this state jurisdiction of the person of the party so served if:

(a) Such service is made by delivering a copy of the summons, together with a copy of the complaint, to the party served in the manner provided by statute or rule of court for service upon a person of like kind within this state; and

(b) Such party has submitted himself to the jurisdiction of the courts of this state in a manner provided by this section.

2. Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection thereby submits himself and, if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from the doing of such acts;

(a) Transacting any business or negotiating any commercial paper within this state;

(b) Committing a tortious act within this state:

(c) Owning, using or possessing any real property situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting; or

(e) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state.

3. Only causes of action arising from these enumerated acts may be asserted against a defendant in an action in which jurisdiction over him is based on this section.

4. The method of service provided in this section is cumulative, and may be utilized with, after or independently or other methods of service." Nev. Rev. Stats. §14.065.

"How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter appearing on the face of the pleading, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of process, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion, except defenses numbered (2)—(4) are waived if joined with one or more defenses other than defenses (2)—(4), or by further pleading after denial of such defenses. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may

assert at the trial any defense in law or fact to that claim for relief, if, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Nev. R. Civ. P. 12(b).

Statement of the Case.

Appellants are former aides, executives and/or doctors who served Howard Hughes and/or his companies for as long as 30 years prior to his death. Appellants and others were sued below by the administrators of Hughes' estate and by three corporations owned directly or indirectly by Hughes, *i.e.* Summa Corporation, Hughes Air Corp. d/b/a Hughes Airwest, and Hughes Properties, Inc. The Second Amended Complaint alleges a myriad of ill-defined misdeeds attributed to the defendants. These include mismanagement, breach of fiduciary duty, and a self-styled grandiose conspiracy to take control of the Hughes empire for their own personal gain by inducing Hughes to become dependent on drugs and secreting him from public view so that his allegedly poor mental and physical condition, and his alleged consequential inability competently to manage his business affairs, would not be discovered by the general public.

None of the appellants are residents of Nevada. Consequently, each was served with process pursuant to Nevada's "long-arm" statute, Nev,. Rev. Stats. § 14.065. Contending that Nevada lacked a sufficient basis for exercising personal jurisdiction over them, appellants moved to quash

service pursuant to Nevada's procedure governing special appearances, Nev. R. Civ. P. 12(b).

Upon appellants' motion and submission of sufficient evidence to place the jurisdictional allegations of the complaint in issue, plaintiffs produced copious affidavits and supporting papers attempting to establish sufficient contacts between appellants and the State of Nevada to support jurisdiction. Appellants responded by submitting documents, prior sworn testimony and counter-affidavits which not only contradicted the jurisdictional claims being made by the plaintiffs, but also contained evidence establishing, on critical facts, that certain of plaintiffs' affiants had given previous testimony and made prior statements which were *directly contrary* to the allegations made in their affidavits. In this and other ways, the evidence presented by appellants sought not only to dispute the plaintiffs' evidence through an overwhelming contrary showing, but also to establish that plaintiffs' affidavits were inherently untrustworthy and should be disregarded by the court, with the result that the plaintiffs would not have satisfied their burden of establishing jurisdiction through credible, admissible evidence.

A fair opportunity to make this evidentiary showing to establish the lack of a sufficient jurisdictional basis was essential at this point due to the nature of Nevada's procedure regarding jurisdictional challenges. Unlike the procedure in the federal courts that permits the court to alter its ruling on the jurisdictional issue at a later stage of the proceedings, *see, e.g., Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir.), *cert. den.* 439 U.S. 864 (1978), the Nevada procedure forever binds the defendant to the initial ruling on the motion to quash. Nev. R. Civ. P. 12(b); *In re Fuller*, 63 Nev. 26, 33 (1945) (dictum). Moreover, the denial of the motion to quash has res judicata effect and cannot be relitigated in a collateral proceeding. *Baldwin v.*

Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). Obviously, under the Nevada procedure, the evidentiary showing made by the non-resident defendant upon his motion to quash is critical; it will be his only opportunity (1) to present evidence on the jurisdictional issue, and (2) to assert his due process right against an excessive state assertion of *in personam* jurisdiction.

Incredibly, the trial court refused to even *consider* appellants' factual showing. Despite appellants' constitutional arguments to the contrary, set forth in their brief to the trial court, the trial court held that plaintiffs' only burden was to present a prima facie case of jurisdiction, and that in considering whether this minimal burden was satisfied, the court could *disregard* any evidence adduced by appellants. If plaintiffs satisfied that burden, said the court, personal jurisdiction over appellants would be conclusively established without consideration of the contrary showing offered by appellants:

> "Thus, once the complaint or the allegations in the complaint are controverted by affidavit, then the defendants' affidavits *are to be disregarded; they disappear*, and it's the plaintiff's prima facie showing that the Court must look to to determine whether the burden of proof has been met in satisfying the long-arm statute, or 14.065." Reporter's Transcript of Proceedings, November 7, 1980, reprinted in Appendix A, *infra* at p. A-13 (emphasis supplied).

Thus, upon appellants' sole opportunity to challenge jurisdiction, the Nevada court refused to even consider the evidentiary basis for their challenge to plaintiffs' purported jurisdictional showing.

The unfairness of the Nevada procedural rule is highlighted by a second consideration, also challenged by this appeal. The motion to quash service that was denied by the

Nevada trial court and is the subject of this appeal was actually the *third* motion to quash made by appellants at the trial level. Appellants had originally prevailed upon their first motion, but rather than finding this ruling on the jurisdictional issue to be dispositive, the trial court permitted plaintiffs to file an amended complaint setting forth a different and, in some respects, inconsistent set of jurisdictional allegations. The trial court then permitted appellants to be served a second time, evoking from appellants a second motion to quash service. Before *this* motion could be heard, plaintiffs were permitted to file a *second* amended complaint, alleging still *another* set of jurisdictional facts. Plaintiffs were then allowed to serve appellants for a *third* time.

Despite appellant's vigorous argument to the contrary, set forth in their brief to the trial court, the trial court held (and the Nevada Supreme Court concurred) that the judicial determination on the first motion to quash was *not* res judicata on the issue of jurisdiction. The sole rationale for this conclusion was that the ruling as to personal jurisdiction was not a "final judgment" within the purview of that doctrine.

Certainly, this ruling by the Nevada courts further highlights the unfairness of the Nevada procedure. Under that procedure, a non-resident defendant, upon being served with process, has the option to either (1) allow the Nevada courts to enter a default judgment against him, taking the unsettling risk that his subsequent collateral attack may be unsuccessful, or (2) enter Nevada and "specially appear", even though a binding adjudication will be made of his rights while he is denied the right to adduce a *shred* of evidence to support his jurisdictional contentions which the court will consider. Moreover, in Nevada a non-resident defendant has no substantive chance to litigate the jurisdictional question, while a plaintiff may do so *ad infinitum* by simply

amending and reamending his complaint and altering his affidavits to state allegations which, *regardless of their veracity*, might allow the defendant to be validly and constitutionally served.

In their briefs to the Supreme Court of Nevada, appellants specifically argued that (1) the trial court's imposition of its version of a prima facie evidentiary standard, and (2) its ruling denying res judicata effect to the earlier order quashing service, violated appellants' right to fundamental fairness and due process of law in the adjudication of the jurisdiction question. The Supreme Court of Nevada rejected both of these contentions without even discussing them. Both of these issues pose substantial constitutional questions that should be resolved by this Court.

STATEMENT OF REASONS WHY THE FEDERAL QUESTIONS INVOLVED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

I.

This Case Presents the Important Federal Question of Whether a State Court May Constitutionally Subject a Non-Resident Defendant to Its Jurisdiction While Refusing to Consider Any Evidence Offered by Him in Support of His Challenge to the Court's Jurisdiction.

There is no question that a non-resident litigant has a due process right not to be subjected to the personal jurisdiction of a foreign state except under the principles enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); and *Hanson v. Denckla*, 357 U.S. 235 (1958). A non-resident defendant's assertion of this due process right, like other constitutional and federal rights, may not be hampered or thwarted by local forms of practice or procedure. *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923). To guarantee a fair opportunity to assert these rights, state courts must afford non-residents due process which, at a bare minimum, demands that the non-residents be provided with notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Guided by these undeniable principles, the Nevada procedure which permits jurisdiction to be decided without consideration of the non-residents' evidentiary showing cannot possibly be upheld. Purporting to permit a non-resident defendant to challenge jurisdiction but not ever allowing him to present any evidence is an insurmountable procedural roadblock to the assertion of his constitutional rights. More-

over, providing the defendant with a hearing on the issue of jurisdiction but forcing him to argue solely from the factual record constructed by his opponent is certainly not the "opportunity to be heard" that is a fundamental requirement of due process.

Plaintiffs nonetheless contended below that this Court's ruling over 90 years ago in *York v. Texas*, 137 U.S. 15 (1890), fully sanctions the Nevada procedure. In *York*, the defendant was a Missouri resident sued in Texas state court and served in Missouri. The defendant specially appeared to challenge the jurisdiction of the court. Although conceding the invalidity of the service, the Texas courts determined that there was no procedure under Texas law for specially appearing to make a jurisdictional challenge and therefore held that the defendant had submitted to Texas jurisdiction by his appearance.

This Court held that the Texas procedure did not violate the due process clause. The basis for this decision was that due process clause had no application at this stage of the proceedings because the defendant had not yet been "deprived" of any "property":

> "[T]he proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved, and there is no just cause of complaint." 137 U.S. at 20.

Plaintiffs contended below, and will presumably argue to this Court as well, that if *York* is correct and no special

appearance procedure is constitutionally required, there can be constitutional infirmity in any special appearance procedure that a state may elect to adopt, including the purported "special appearance" procedure in Nevada. However, plaintiffs' argument totally ignores a significant difference between the situations in *York* and in the instant case. Unlike Texas in 1890, Nevada has in fact established a procedure under which it purports to *adjudicate* the issue of jurisdiction. Although it may not have been required to have such a procedure if *York* is still valid, it nonetheless had decided to do so and has purported to adjudicate this issue. This judicial determination, when merged into an ultimate judgment, is entitled to full faith and credit and cannot be relitigated, *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931), and like all other judicial determinations it must be rendered in accordance with the requirements of due process. As was pointed out in the context of an indigent's request for a state-supplied transcript on appeal, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the mere fact that a state is not constitutionally required to afford a procedure to a litigant (there, an appeal; here, a special appearance to contest *in personam* jurisdiction) does not authorize "the imposition of conditions that offend the deepest presuppositions of our society." 351 U.S. at 22 (Frankfurter, J., concurring). In effect, what Nevada has done in this case, through Nev. R. Civ. P. 12(b) and Nev. Rev. Stats. § 14.065, as interpreted and applied by the Supreme Court of Nevada, is akin to giving a litigant a right to a trial of a dispute and then denying that litigant the right to ask any questions or introduce any evidence. Manifestly, due process requires more. Since the determination of *in personam* jurisdiction was made outside of the bounds of the minimum requirements of due process, it cannot be validated.

Furthermore, in the 90 years since the *York* decision, this Court rendered a number of decisions which seriously undermine *York's* continued validity. As far back as 1915, the shift away from *York* began in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915). The defendant, a Virginia corporation, was sued in a North Carolina state court and was served by service in North Carolina on one of its directors, who was a resident of North Carolina. The North Carolina Supreme Court, although recognizing that the non-resident defendant might have a valid constitutional objection to personal jurisdiction, nonetheless held that the entry of judgment against the defendant was proper. Like the decision in *York*, the North Carolina court's decision was based upon the fact that the plaintiff was not yet attempting to execute upon the defendant's property, and therefore the due process clause was not applicable. In reversing this decision, this Court stated:

> "It is self-evident that the application of these settled principles establishes the error of the decision of the court below [in upholding jurisdiction] unless it be that the distinction upon which the court acted be well founded; that is, that the enforcement of due process under the 14th Amendment was without influence upon the power to render the judgement, since that limitation was pertinent only to the determination of when and how the judgment, after it was rendered, could be enforced. But this doctrine, while admitting the operation of the due process clause, simply declines to make it effective. That is to say, it recognizes the right to invoke the protection of the clause, but denies its remedial efficiency by postponing its operation, and thus permitting that to be done which, if the constitutional guaranty were applied, would be absolutely prohibited. But the obvious answer to the proposition is that wherever a provision of the Constitution is ap-

> plicable, the duty to enforce it is imperative and all-embracing, and no act which it forbids may therefore be permitted. If the suggestion be that although, under the jurisdiction which was exerted, in form a money judgment was entered, as no harm could result until the execution, therefore no occasion for applying the due process clause arose, it suffices to say that the propostion but assumes the issue for decision, since the very act of fixing by judicial action without a hearing a sum due, even although the method of execution be left open, would be, in and of itself, a manifestation of power repugnant to the due process clause." 237 U.S. at 195-196.

This language strongly suggests that, contrary to *York*, this Court would not countenance the entry of a judgment without a valid jurisdictional basis simply because an avenue of attack upon the judgment would be available upon any attempt to execute thereon.

The apparent demise of *York* in the face of *Riverside* became complete upon rendition of this Court's landmark decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the Court held that the strict territoriality notion of the constitutional limits of the jurisdictional power of a state court as formulated in *Pennoyer v. Neff*, 95 U.S. 714 (1878), was no longer the exclusive test, and that the inquiry should focus upon whether the defendant had "minimum contracts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316. This "fairness" standard has been repeatedly reaffirmed by this Court. *E.g. McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980).

With "fairness" as the criterion, it is clear that *York* cannot survive. The unfairness of requiring the non-resident defendant to allow the case to go to a default judgment against him in order to make his jurisdictional challenge has been specifically recognized in the context of cases determining that the denial of a motion to quash is sufficiently "final" to permit review by this Court. Thus, in *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1, 15 L.Ed.2d 39 (1965) [opinion by Goldberg, J., in chambers], Justice Goldberg stated that decisions finding finality in analogous situations "rest upon the premise that a litigant should not be forced to take the risk of a default judgment in order to obtain the benefits which national policy — . . . here, if appellant is correct, due process — is designed to afford him." 15 L.Ed.2d at 43. This unfairness was reiterated by this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), where, in finding the denial of a motion to quash to be final for the purpose of review, this Court stated that:

> "if the judgment below were considered not to be an appealable final judgment (citations omitted), appellants would have the choice of suffering a default judgment or entering a general appearance and defending on the merits." 433 U.S. at 195 n. 12.

York, decided in the era of *Pennoyer*, is consistent with the outdated, strict territoriality concept of personal jurisdiction. With the state having complete sovereign power over defendants who might be found within its borders, and with fairness not being a relevant consideration, it was completely logical to uphold a state procedure subjecting a defendant to *in personam* jurisdiction if he presented himself within the state's sovereign territory, even if only for the limited purpose of contesting the state's exercise of jurisdiction over his person. However, once "fairness" became a consideration with the *International Shoe* decision, any

remaining vestige of *York* could no longer be sustained. Under anyone's conception of the "traditional notions of fair play and substantial justice", it is simply not fair to force the non-resident defendant either to consent to jurisdiction by appearing in the foreign forum or to take his chances on being able to sustain his jurisdictional challenge when execution is subsequently attempted, knowing that he has lost any opportunity to defend the case on the merits if his jurisdictional challenge is unsuccessful. Such blatant coercion of the non-resident defendant to submit himself to the jurisdiction of the foreign court cannot be countenanced under the modern interpretations of the limits of due process.

II.

This Case Presents the Important Federal Question of Whether a Non-Resident Defendant May Constitutionally Be Required to Make a Multiple Succession of Successful Challenges to the Jurisdiction of a State Court in Order to Prevent Its Exercise of in Personam Jurisdiction Over Him.

As previously stated, appellants made three separate motions to quash service of the summons below. Their first motion was granted, and the plaintiffs then filed a first amended complaint, this time trying a different set of jurisdictional facts than in their original complaint. Appellants were then served with a second summons, and were forced to file another motion to quash. This time, the plaintiffs did not even wait for the motion to be heard before filing a second amended complaint, alleging yet another set of jurisdictional facts. Appellants were then served with a third summons and filed a third motion to quash, which is the subject of this appeal.

The instant case is a clear illustration that the Nevada statute, as interpreted and applied by the Nevada Supreme

Court, allows the plaintiffs to re-litigate the jurisdictional issue numerous times on several different (and, in this case, inconsistent) sets of jurisdictional facts until they are ultimately successful, the sole limit on the number of attempts permitted being the trial court's discretion to deny leave to file an amended complaint.*

In contrast to the broad re-litigation privileges accorded to the plaintiff, the non-resident defendant is forever bound once the plaintiff has made a prima facie showing of jurisdiction, regardless of whether it be on the first or the hundredth litigation of the issue. If the non-resident defendant makes any further appearance in the case, he will have consented to jurisdiction. If he makes no further appearance and allows the case to go to judgment for the plaintiff, he will not be able to collaterally attack the jurisdiction of the Nevada court because that issue will have already been litigated in Nevada and will be accorded res judicata effect. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931).

The Nevada Supreme Court, in interpreting and applying the Nevada statute and rule to reach this incredibly unfair result, bases its decision upon the tenuous ground that the trial court's prior ruling granting the previous motion to quash was not a final judgment and therefore not entitled to res judicata treatment. This hyper-technical interpretation certainly cannot be reconciled with the public policy that there be an end to litigation and that those who have contested an issue be bound by the result, which is the basis

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*The likelihood that the trial court will deny leave to file an amended complaint is questionable since the non-resident defendant is effectively prevented from opposing such a motion. As the Nevada Supreme Court has ruled in this very case in connection with defendants Davis *et al.* (who are not involved in this appeal), a defendant is deemed to have made a general appearance and consented to jurisdiction if he opposes such a motion. Appendix A, *infra* at pp. A-3 through A-5.

for the doctrine of res judicata. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 525 (1931). It is indeed ironic that this technical decision was made possible only by the grossly unfair Nevada procedure of subjecting the non-resident defendant to general jurisdiction if he seeks to convert his successful motion to quash into a final judgment (which would be entitled to res judicata effect) by seeking a dismissal of the complaint. *Consolidated Casinos Corp. v. L.A. Caunter & Co.*, 89 Nev. 501 (1973).

Although the Nevada Supreme Court, like the highest court of every other state, is permitted to formulate its own public policy, our federal system places limits on its discretion so as to prevent the type of abuse that occurred in this case. The Nevada Supreme Court may not, in the name of public policy or local law, deny or otherwise thwart the constitutional rights of the litigants in its courts. It cannot, under the guise of public policy or the interpretation of state law, permit a procedure which "offend[s] 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Nor can it, in the guise of local procedure, erect a barrier to the assertion of rights protected by the Constitution. *See Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923).

The unfairness to these appellants could not be more obvious and compelling. They have been forced to re-litigate their jurisdictional challenge, while at the same time being bound by the first adverse ruling on the issue. Certainly the characterization of a "procedural roadblock to the assertion of constitutional rights" is most appropriate in this case, and it is submitted that the Nevada procedure cannot possibly survive appellants' due process challenge.

Conclusion.

For these reasons, appellants respectfully request that this Court note probable jurisdiction.

Dated: September 16, 1981.

Respectfully submitted,

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Of Counsel:

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JOLLEY, URGA & WIRTH.

APPENDIX A.

Opinion.

In the Supreme Court of the State of Nevada.

Chester C. Davis, Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook, Petitioners, vs. The Eighth Judicial District of the State of Nevada, in and for the County of Clark, and The Honorable J. Charles Thompson, Respondents. No. 12808.

Frank William Gay, Levar Beebe Myler and John M. Holmes, Jr., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and The Honorable J. Charles Thompson, Respondents. No. 13012.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); Summa Corporation: Hughes Air Corp., d/b/a Hughes Airwest, and Hughes Properties, Inc., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; The Honorable J. Charles Thompson, District Judge, Eighth Judicial District Court; Howard Lorenzo Eckersley; James H. Rickard; and Wilbur Sutton Thain, M.D., Respondents. No. 13048.

Original Proceedings in Prohibition and Mandamus. Denied in cases 12808, 13012. Granted in 13048.

Lewis, D'Amato, Brisbois & Bisgaard, R. Gaylord Smith, Esq. Los Angeles; Houston, Moran & Kennedy, John T. Moran, Jr., Esq., Las Vegas, for Petitioners in 12808.

Jolley, Urga & Wirth, Roger A. Wirth, Esq., Las Vegas; Sheppard, Mullin, Richter & Hampton, Terence M. Murphy, Esq., Los Angeles, for Petitioners in 13012 for Respondents in 13048.

Echeverria & Osborne, Peter Echeverria, Esq., Las Vegas; Kindel & Anderson, Malcolm George Smith, Esq., Los Angeles; Parson, Behle & Latimer, Gordon L. Roberts, Esq., Salt Lake City; Fitzgibbons & Beatty, Thomas D. Beatty, Esq., Las Vegas, for Petitioners in 13048 for Respondents in 12808, 13012.

Filed June 26, 1981.

By the Court, MOWBRAY, J.:

These original proceedings are a consolidation of three cases: in 12808 and 13012, the lower court refused to quash service of process upon petitioners; in 13048, the lower court granted defendant-respondents' motion to quash service of process.

THE FACTS

On January 24, 1979, a complaint was filed by the Nevada Co-Administrators for the Estate of Howard R. Hughes, Summa Corporation, Hughes Air Corporation, and Hughes Properties (hereinfter collectively referred to as "Summa") against the group of aides, physicians, attorneys, and business executives who had attended the late Hughes during the last years of his life. The complaint alleged essentially that the group conspired to seize control of the Hughes' empire for their own financial gain by taking advantage of the trust and confidence Hughes had placed in them.

All petitioners in 12808 and 13012, except Maxwell Cox, Howard Jaffe, and Martin Cook, and the respondents in 13048 were named as defendants in the original complaint. These out-of-state defendants filed motions to quash service of summons contending that Nevada lacked jurisdiction; the

Honorable Paul S. Goldman, District Judge, granted the motion as to petitioners Gay, Myler, Holmes, Davis, Davis and Cox, a partnership, and respondents Eckersley, Rickard, and Thain.

Thereafter, Summa filed a first amended complaint. The defendants again filed motions to quash service of summons, but before the lower court considered these motions, Summa sought leave to file a second amended complaint naming, as additional defendants, petitioners Cox, Jaffe, and Cook. Leave was granted; the second amended complaint was filed on November 28, 1979.

The out-of-state defendants again filed motions to quash service of process. The Honorable J. Charles Thompson, District Judge, to whom the case was then assigned, denied the motions on June 20, 1980, as to petitioners Cox, Davis, Cook, Jaffe, and Davis and Cox, a partnership, number 12808; he also denied the motions as to Gay, Myler and Holmes on November 13, 1980, number 13012; however, on November 14, 1980, the judge granted the motions and quashed service as to respondents Eckersley, Rickard, and Thain, number 13048. From these orders the parties petition this court.

NUMBER 12808

General Appearance

In response to Summa's motion for leave to file a second amended complaint, petitioners filed points and authorities in opposition. They appeared and argued before the court. The lower court ruled that petitioners had waived their special appearance, and had submitted themselves to the jurisdiction of the Nevada court.

This court has considered the issue of general and special appearances a number of times, but never in the context of opposing a motion for leave to file an amended complaint.

We have held that when a defendant seeks relief additional to that necessary to protect him from service of process, he enters a general appearance. Alitalia-Linee Aeree v. District Court, 92 Nev. 638, 555 P.2d 1325 (1976); Deros v. Stern, 87 Nev. 148, 483 P.2d 648 (1971); Havas v. Long, 85 Nev. 260, 454 P.2d 30 (1969); Selznick v. Eighth Judicial District Court, Etc., 76 Nev. 386, 355 P.2d 854 (1960). Petitioners argue that their opposition for leave to amend the complaint was predicated solely upon their assertion that Nevada court lacked jurisdiction over the defendants; they cite Chitwood v. County of Los Angeles, 92 Cal. Rptr. 441 (Cal.App. 1971). *See also*, Housley v. Anaconda Company, 427 P.2d 390 (Utah 1967).

Our review of the record leads us to conclude otherwise. In resisting the motion petitioners argued that leave to amend should not have been granted because of the prejudicial effect it would have on a related action petitioners had filed in New York against Summa. They also contended that the allegations in the proposed second amended complaint were identical to those in the then filed first amended complaint.[1] During argument before the district court, petitioners, counsel sought attorneys' fees from Summa as a condition for leave to amend the complaint.[2]

[1]Petitioners argued below: "The proposed second amended complaint presents identical *causes of action* to those presented in the first amended complaint now before the court. The changes effected by the proposed second amended complaint are merely evidentiary — plaintiffs plead numerous disparate evidentiary facts for cosmetic purposes while still failing to allege what defendants told Howard Hughes that was incorrect or what defendants did which was beyond their authority." (Emphasis in original.)

[2]Petitioners' counsel stated: "Rule 15A or B expressly confers upon this court the power to impose conditions and I think the literal terms of that will duly invest you with sufficient power to require plaintiffs to pay me as a condition for permitting them to file something with your Clerk."

We conclude that petitioners did make a general appearance and submitted themselves to the jurisdiction of the district court. "Where the defendant appears, and asks some relief which can only be granted on the hypotheses that the court has jurisdiction of the cause and person, it is a submission to the jurisdiction of the court." Goodwine v. Superior Court of Los Angeles, 407 P.2d 1, 3 (Cal. 1965).

Res Judicata.

Petitioners here, and in case number 13012, suggest that the order of Judge Goldman quashing service of summons on the original complaint is res judicata on the issue of in personam jurisdiction. The second amended complaint basically contains the same causes of action as the original complaint. However, the second complaint alleges, with more specificity, the tortious acts which Summa contends occurred in this state. The question presented is whether the previous order quashing service of process is entitled to the finality which evokes the doctrine of res judicata.

An order quashing service of summons may be attacked only through a writ of mandamus. Jarstad v. National Farm Union, 92 Nev. 380, 552 P.2d 49 (1976). It is not a judgment as defined in our rules of civil procedure: " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." NRCP 54(a). The time limit for filing an appeal, NRAP 4(a), does not pertain to a writ of mandamus; this extraordinary remedy is subject to the doctrine of laches. Buckholt v. District Court, 94 Nev. 631, 584 P.2d 672 (1978). An order quashing service of summons is not treated as an appealable final judgment under our rules of civil procedure.

Petitioners rely on a number of cases which find a direct estoppel to exist on a jurisdictional issue once decided: MIB, Inc. v. Super. Ct. of Los Angeles Cty., 164 Cal.Rptr. 828

(Cal.App. 1980); Radakovich v. Weismann, 359 A.2d 426 (Pa.Super. 1976); Archie v. Piaggio, 245 A.2d 76 (N.H. 1968). However, in each of these cases the order quashing service was directly appealable and it became a final judgment.

Here the order quashing service of process was not appealable and did not obtain the status of a final judgment. The district court did not err in refusing to apply the res judicata doctrine.

NUMBER 13012
Burden of Proof.

In addition to the issue of res judicata, the inapplicability of which we discussed in number 12808 and incorporate herein, petitioners argue that the lower court failed to apply the correct burden of proof in determining whether sufficient contacts existed to justify the exercise of jurisdiction: they contend that respondents need to have proved the existence of sufficient contacts by a preponderance of the evidence. The lower court ruled that a prima facie showing of sufficient contacts was sufficient. We agree.

When a challenge to personal jurisdiction is made, the plaintiff in the action has the burden of establishing the existence of jurisdiction. Basic Food Indus., Inc. v. District Court, 94 Nev. 111, 575 P.2d 934 (1978). This burden is met by introducing competent evidence of essential facts which establishes a prima facie showing of the existence of in personam jurisdiction. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Harvel v. District Court in & for County of Jefferson, 444 P.2d 629 (Colo. 1968). Unlike the situation in Basic Food Indus., Inc., *supra*, where the plaintiff rested solely upon the allegations of the complaint to establish such jurisdiction, our review of the record

in the instant case reveals sufficient evidentiary material set forth in numerous affidavits to satisfy the prima facie standard of proof. The trial judge's ruling was correct.

NUMBER 13048

The respondents in the two previous cases are the petitioners here seeking a writ of mandamus directing the lower court to exercise its jurisdiction over Eckersley, Rickard, and Thain. We again incorporate our discussion and rulings on the issues of res judicata and the proper burden of proof as set forth in case numbers 12808 and 13012.

The Nevada Long-Arm Statute.

The lower court quashed service of process on respondents Eckersley, Rickard, and Thain in case number 13048.

Summa, in its complaint, had alleged that the said respondent-defendants had conspired out of the state of Nevada to cause injury to Summa's property located in Nevada. The court based its ruling on its conclusion that Nevada's long-arm statute, NRS 14.065, did not apply under the alleged facts.[3] We do not agree.

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[3]NRS 14.065 provides in pertinent part:

"*Personal service of process on party outside state.*

2. Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection thereby submits himself and, if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from the doing of such acts:

(a) Transacting any business or negotiating any commercial paper within this state;

(b) Committing a tortious act within this state;

(c) Owning, using or possessing any real property situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting; or

(e) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state.

In Certain-Teed Prods. v. District Court, 87 Nev. 18, 23, 479 P.2d 781, 784 (1971), we held:

> "The broad language used in the statute discloses a legislative intention to reach the outer limits of federal constitutional due process. Such phrases as 'transacting any business within this state,' 'negotiating any commercial paper within the state,' 'committing a tortious act within this state,' are almost without restriction or limitation."

The California long-arm statute shows a similar broad intent by permitting jurisdiction to attach when predicated on any ground not inconsistent with federal due process. C.C.P. § 410.10. The California Judicial Council's annual report construing this section concludes that "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects". Quattrone v. Superior Court for County of Los Angeles, 118 Cal.Rptr. 548, 552 (Cal. App. 1975).

We conclude that it is reasonable and constitutionally permissible to require the respondent-defendants to appear and defend their activities in Nevada where the alleged injuries occurred. As the High Court recently reiterated in World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980):

> "The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.' We have said that the defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice." ' International Shoe Co. v. Washington, *supra*, at 316, quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to de-

fend the particular suit which is brought there.' 326 U.S., at 317. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see Kulko v. California Superior Court, *supra*, at 92, [419 U.S. 84 (1971)] at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf.* Shaffer v. Heitner, 433 U.S. 186, 211, n.37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see Kulko v. California Superior Court, *supra*, at 93, 98." (Citation added.)

The court below erred in granting the motion to quash the service of process.

For these reasons we deny the petitions in numbers 12808 and 13012, and we grant the petition in 13048.

/s/ Mowbray, J.
Mowbray

We concur:

/s/ Gunderson, C.J.
Gunderson

/s/ Manoukian, J.
Manoukian

/s/ Batjer, J.
Batjer

/s/ Springer, J.
Springer

Decision.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark,

First National Bank of Nevada, et al., Plaintiffs, vs. Frank William Gay, et al., Defendants. Case No. A185995, Department One.

Reporter's Transcript of Proceedings, Before The Honorable J. Charles Thompson, District Judge, Friday, November 7, 1980, 9:25 o'clock a.m.

APPEARANCES: For the Plaintiffs: Thomas D. Beatty, Esq., Fitzgibbons & Beatty. For Defendants Gay, Glenn, Myler, Holmes, Waldron, Thain, Eckersley & Rickard: William R. Urga, Esq., Jolley, Urga & Wirth. Reported by: Paula A. Chapman, C.S.R.

Las Vegas, Nevada, Friday, November 7, 1980, 9:25 o'clock a.m.

The Court: Case No. A185995, First National Bank of Nevada versus Frank William Gay.

The record will reflect the presence of Mr. Beatty and Mr. Urga.

Do either of you desire that the matter be reported?

Mr. Beatty: We do, your Honor.

The Court: The record will so reflect.

First of all, let me compliment you on your briefs, not particularly brief, but they gave me a great deal of assistance in trying to reach a decision in the matter.

I considered writing an opinion, but I know and you know that this matter is going to be resolved by the Supreme Court after this decision. I'm simply the vehicle by which you get there, and you've got an awful lot more in resources with all your foreign counsel than I do to articulate a decision,

and I don't know that I could articulate one that really meets the standards of the fine briefs that you wrote.

I'm not going to cover each and every one of the points that were mentioned in your briefs. We would be here all day if we did that. I'm going to cover what I feel to be the important resilient points in summary without any citation to authorities. There are plenty of them that support almost any proposition I came up with, and I'll let you just simply argue within the Supreme Court, depending upon the resolution.

Let met start with the doctrine of res judicata. I conclude that the doctrine of res judicata or direct estoppel, as the defendants put it, cannot be applied to Judge Goldman's decision.

Res judicata applies only to a final judgment. An order granting a motion to quash does not qualify as a final judgment. It's not appealable.

While it might be reviewed on mandamus or through some other extraordinary writ, it's still not a final judgment and the doctrine of res judicata doesn't apply.

NRS 14.065 is Nevada's long arm statute. Before discussing the allegations of conspiracy in this case, let me give you my views generally on the application of 14.065.

First of all, a tortious act must be committed in Nevada. Judge Goldman was absolutely right in holding that one must commit a tortious act within Nevada before he will be deemed to have submitted himself to the jurisdiction of this Court.

I respect the view that the long arm statute encompasses tortious acts committed outside the state which simply cause injury within the state. The statute is clear; it's unambiguous on its face. It plainly requires that a tortious act be committed within the state, and I perceive no reason to rewrite it or

reach a strained construction. The Longines-Wittnauer case and the Wilshire Oil Company federal case arising out of Kansas are ample authority for that proposition.

Secondly, the burden of proof.

When the factual allegations of the complaint are controverted by affidavit, as they now are in this case, the plaintiff then has the burden to present prima facie evidence of the commission of the tortious act in Nevada. In fact, the plaintiff must present prima facie evidence that each moving defendant committed a tortious act in Nevada.

I expressly reject the defendants' contention that the plaintiff must now prove the commission of a tortious act by a preponderance of the evidence. Now, that requires weighing or balancing evidence, and I could never agree with the procedure that requires a judge to weigh evidence and decide on the credibility of witnesses based upon conflicting affidavits. You simply can't have a trial on the motion to quash and take testimony. If you do, we'd have two trials in the case. Thus, once the complaint or the allegations in the complaint are controverted by affidavit, then the defendants' affidavits are to be disregarded; they disappear, and it's the plaintiff's prima facie showing that the Court must look to to determine whether the burden of proof has been met in satisfying the long arm statute, or 14.065.

Thirdly, meeting the burden of proof as regards 14.065 when the allegation is conspiracy.

To determine whether the prima facie showing has been met involves special problems when the complaint alleges a conspiracy. Most other torts involve one or two simple elements, all of which usually occur simultaneously, if at all, and all of which usually occur in the same place, if they do at all.

Conspiracy is said to have five elements, and it's quite possible for one or more of those to occur in different places.

For example, the agreement could occur in one state, an overt act in a second state, an injury to a plaintiff in a third state. Thus, it's quite possible to have a conspiracy formed outside Nevada and to have damage within Nevada, but no overt act committed here.

Now, we know from general tort principles that every co-conspirator is liable for all overt acts committed in the course or in pursuance of the conspiracy. Whether he participated in the particular act or not, whether he was actually present when the act was committed or not, and despite how long or how small his participation in that conspiracy was, is he to be subjected to the jurisdiction of a foreign forum if he has committed no overt acts there and has caused no damage there, but was otherwise a member of the alleged conspiracy?

I think not. While each of the co-conspirators may be liable for the acts of the other co-conspirators in damages, jurisdiction over each co-conspirator must be independently established.

While I find no decisions in this country on the point and I really don't have any guidance to support my decision in this case, I think it to be inconsistent with traditional notions of fair play and substantial justice to hold otherwise.

Substantial contacts with the forum state must be present before the forum court assumes jurisdiction in a civil cause of action. Therefore, I hold that for a Court in Nevada to assert jurisdiction over a member of an alleged conspiracy, a prima facie showing must be made that that moving defendant himself committed at least one or more overt acts within Nevada, and that as a result thereof, there is injury or damage resulting to the plaintiff in Nevada.

Now, I recognize, incidentally, that under this rule it would be theoretically possible for the mastermind of a conspiracy to have planned it in Nevada and because all the overt acts occurred in another state or because injury to the plaintiff occurred in another state, the mastermind would not be subject to the jurisdiction of this Court unless, of course, he had been personally served here. Frankly, I'm not offended by that result.

To repeat, then; in meeting the burden of proof to convince a Court that a tortious act has occurred in Nevada, and by tortious acts, I'm using the phrase of 14.065—a tortious act which satisfies the requirements of 14.065 is a better way to articulate it—but when the allegation is conspiracy, the plaintiff must show one or more overt acts committed by the moving defendant within this jurisdiction and injury or damage to the plaintiff in Nevada.

Now, let me turn to the evidence in the case.

As opposed to the posity of evidence which was presented in opposition to the first motion to quash, there is an ample showing made by plaintiff which now, if believed, prove that the defendants Gay, Myler, and Holmes, participated in the alleged conspiracy. All three were directors of Summa Corporation. All three were present at the numerous board meetings here in Nevada. All three were present in Nevada for extended periods of time, during which many of the alleged overt acts of the conspiracy took place, and they participated in them to a greater or lesser extent.

Gay, along with Davis, obtained Hughes' proxy here in Nevada. After Mayhew was fired, Gay had the ultimate authority over the management of the Hughes' Nevada hotels; the nerve center of Summa was located here in Nevada; the bulk of Hughes' wealth is located in Nevada; and all three individuals, Gay, Myler and Holmes, acquired a sub-

stantial portion of the wealth, directly or indirectly in Nevada; and if one believes the allegations contained in the affidavits in support of the plaintiff's prima facie showing, as a result of the combination thereof, jurisdiction then over these three nonresident defendants does not offend traditional notions of fair play and substantial justice.

The facts alleged as against Thain, Eckersley and Rickard are simply insufficient.

For the most part, Thain and Rickard were never in Nevada. Eckersley's contact in Nevada, contact with the alleged conspiracy, and the overt acts that were allegedly occurring in Nevada, is tenuous at best.

I conclude that the necessary prima facie showing of each one of these three individuals has not been made. Accordingly, the motion to quash is granted as to Defendants Thain, Eckersley and Rickard.

The motion to quash is denied as to Defendants Gay, Myler and Holmes.

Now, keep in mind that my ruling doesn't depend on whether or not I believe the evidence presented by the plaintiffs, or I should say, the affidavits and the other sworn material presented by the plaintiffs, as opposed to that presented by defendants. It's not whether I believe that these things actually took place that counts. That's weighing the evidence. That's what a judge can't do upon affidavits at this point in these proceedings and that's what I can't do on a motion to quash when it's not presented on testimony.

The key is that a prima facie showing of the conspiracy has been made as to three individuals. That simply means that there is evidence taking the plaintiff's showing at face value and disregarding the defendants' contrary affidavits, that if believed by the trier of the facts would justify a

finding that overt conspiratorial acts resulting in damage occurred in the State of Nevada.

Mr. Beatty will prepare an appropriate order as regards Defendants Gay, Myler and Holmes. Those three defendants will have 20 days from this data to answer or otherwise plead to the amended complaint on file, unless within those 20 days they file an appropriate Petition for Prohibition to the Supreme Court, in which event their obligation to respond will be stayed until that petition be dismissed or until further order of the Supreme Court.

And Mr. Urga will prepare an appropriate order as regards Defendants Thain, Eckersley and Rickard.

Mr. Urga: Your Honor, may we have 20 days to run from the date the order is entered?

Mr. Beatty: It's likely to be today or Monday, your Honor.

The Court: That's fine. From the date that the order is entered.

Mr. Urga: So we can see the order.

The Court: Okay. That sounds fair.

Mr. Urga: Thank you, your Honor.

Mr. Beatty: Thank you, your Honor.

(Thereupon the proceedings in the above-entitled matter were concluded.)

ATTEST: Full, true and accurate transcript of the proceedings.

/s/ Paula A. Chapman
PAULA A. CHAPMAN, C.S.R.

Order Denying Motion to Quash of Defendants Gay, Myler and Holmes.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); William R. Lummis, Nevada Co-Special Adminstrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); Summa Corporation, Hughes Air Corp., d/b/a/ Hughes Airwest, and Hughes Properties, Inc., Plaintiffs, vs. Frank William Gay, Chester C. Davis, Nadine Henley Marshall, Davis & Cox, a Partnership, Maxwell E. Cox, Howard M. Jaffe, D. Martin Cook, Kay Gibbons Glenn, Levar Beebe Myler, John Morrison Holmes, Jr., Clarence Albert Waldron, Howard Lorenzo Eckersley, James H. Rickard, Wilbur Sutton Thain, M.D., John Does One Through Six, Ajax Corporations One Through Six; and Able & Baker Partnerships One Through Six, Defendants. Case No. A185995, Department No. I, Docket "J".

Filed November 13, 1980.

The Motion to Quash Service of Process filed by Defendants FRANK WILLIAM GAY, LEVAR BEEBE MYLER and JOHN MORRISON HOLMES, JR., by and through their attorneys, TERRENCE M. MURPHY and ROGER WIRTH, having been filed with this Court;

The Court having received and thoroughly reviewed Plaintiffs' Memorandum in Opposition along with the extensive exhibits, and having thoroughly reviewed the Reply Memorandum and additional exhibits of Defendants FRANK WILLIAM GAY, LEVAR BEEBE MYLER and JOHN MORRISON HOLMES, JR.;

And the Court having concluded from review of all the authorities and exhibits offered by the parties that there is an ample showing made by Plaintiffs which supports the exercise by this Court of Jurisdiction over the Defendants GAY, MYLER and HOLMES, and it further appearing from all the exhibits and facts before the Court that jurisdiction over these three non-resident Defendants under Nevada's longarm statute, NRS 14.065, does not offend traditional notions of fair play and substantial justice and would not result in any unconstitutional exercise of jurisdiction by this Court over these Defendants,

IT IS HEREBY ORDERED:

1. That the Motion to Quash Service of Process on the Second Amended Complaint, filed by Defendants FRANK WILLIAM GAY, LEVAR BEEBE MYLAR and JOHN MORRISON HOLMES, JR., should be and the same is hereby denied;

2. That Defendants FRANK WILLIAM GAY, LEVAR BEEBE MYLER and JOHN MORRISON HOLMES, JR., should be and hereby are required to answer or otherwise plead to the Second Amended Complaint of Plaintiffs, on file herein, within twenty (20) days from the date of this Order, unless within said twenty (20) day period the said Defendants shall have filed an application for Writ of Prohibition with the Supreme Court of Nevada, seeking relief

from this Order, in which event the requirement that said Defendants answer or otherwise plead shall be stayed until that application for Prohibition be dismissed or until further order of the Supreme Court.

DATED this 13th day of November, 1980.

/s/ J. Charles Thompson
J. CHARLES THOMPSON,
District Judge

SUBMITTED BY:

PETER ECHEVERRIA, Esquire
Echeverria & Osborne
555 South Center Street
Reno, Nevada 89501
By: /s/ Thomas D. Beatty
THOMAS D. BEATTY, Esquire
Fitzgibbons & Beatty
1829 East Charleston Blvd., #104
Las Vegas, Nevada 89104
Attorneys for Plaintiffs

Order Quashing Service of Process as to Defendants Eckersley, Rickard and Thain.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

First National Bank of Nevada, Nevada Co-special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); Summa Corporation; Hughes Air Corporation, d/b/a Hughes Airwest, and Hughes Properties, Inc., Plaintiffs, vs. Frank William Gay, Chester C. Davis, Nadine Henley Marshall, Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe, D. Martin Cook, Kay Gibbons Glenn, Levar Beebe Myler, John Morrison Holmes, Jr., Clarence Albert Waldron, Howard Lorenzo Eckersley, James H. Rickard, Wilbur Sutton Thain, M.D., John Does One Through Six, Ajax Corporations One Through Six; and Able & Baker Partnerships One Through Six, Defendants. Case No. A 185995, Dept. No. I, Docket: "J".

Filed November 18, 1980.

The motion to quash service of process filed herein January 30, 1980 by Defendants Frank William Gay, Levar Beebe Myler, John Morrison Holmes, Jr., Howard Lorenzo Eckersley, James H. Rickard, and Wilbur Sutton Thain having come on for decision the 7th day of November 1980, the court having considered points and authorities, affidavits and exhibits upon said motion, and the pleadings and papers on file herein, the court being fully advised in the premises and good cause appearing, it is hereby

ORDERED that the Motion to Quash Service of Process is hereby granted as to Defendants Howard Lorenzo Eck-

ersley, James H. Rickard, and Wilbur Sutton Thain, and the return of service upon said defendants is quashed.

DATED: This 14 day of November 1980.

/s/ J. Charles Thompson
DISTRICT JUDGE

Submitted by:
JOLLEY, URGA & WIRTH

By /s/ William R. Urga,
WILLIAM R. URGA, ESQ.
302 East Carson, Suite 514
Las Vegas, Nevada 89101
Attorneys for Defendants: Gay, Myler, Holmes, Eckersley, Rickard and Thain

Writ of Mandate.

In the Supreme Court of the State of Nevada.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); Summa Corporation, Hughes Air Corp., d/b/a/ Hughes Airwest, and Hughes Properties, Inc., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; The Honorable J. Charles Thompson, District Judge, Eighth Judicial District Court; Howard Lorenzo Eckersley; James H. Rickard; and Wilbur Sutton Thain, M.D., Respondents. No. 13048.

Filed July 30, 1981.

TO: The Honorable J. Charles Thompson, Judge of the Eighth Judicial District Court:

WHEREAS, This Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are directed to exercise your jurisdiction over Howard Lorenzo Eckersley, James H. Rickard and Wilbur Sutton Thain, M.D., in case No. A185995, now pending in the Eighth Judicial District Court.

WITNESS The Honorables E.M. Gunderson, Chief Justice, and Noel E. Manoukian, Cameron M. Batjer, Charles E. Springer and John Mowbray, Associate Justices of the Nevada Supreme Court, and attested by my hand and seal this 24th day of July, 1981.

/s/ C. R. Davenport
Clerk of the Supreme Court

[Seal]

Notice in Lieu of Remittitur.

In the Supreme Court of the State of Nevada.

Frank William Gay, Levar Beebe Myler, and John Morrison Holmes, Jr., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada in and for the County of Clark, et al., Respondents. No. 13012.

TO THE ABOVE-NAMED PARTIES:

The decision and opinion of the court in this matter having been rendered on June 26, 1981, and no petition for rehearing having been filed and the motion to stay having been denied,

Notice Is Hereby Given that the opinion and decision rendered herein has, pursuant to Rule 40(a) of the rules of this court, become effective.

Dated this 24th day of July, 1981.

C. R. Davenport, Clerk
/s/ C. R. Davenport

cc:
Messrs. Jolley, Urga & Wirth
Messrs. Sheppard, Mullin, Richter & Hampton
Messrs. Echeverria & Osborne
Messrs. Parson, Behle and Lattimer
Messrs. Lewis, D'Amato, Brisbois & Bisgaard

Notice of Appeal.

In the Supreme Court of the State of Nevada.

First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest, and Hughes Properties, Inc., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada in and for the County of Clark; The Honorable J. Charles Thompson, District Judge, Eighth Judicial District Court; Howard Lorenzo Eckersley; James H. Rickard; and Wilbur Sutton Thain, M.D., Respondents. Case No. 13048.

Filed Aug. 3, 1981.

To: First National Bank of Nevada; William R. Lummis; Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest; and Hughes Properties, Inc., Petitioners; and.

To: Echeverria & Osborne, Chartered, Fitzgibbons & Beatty, and Parson Behle and Lattimer, their attorneys:

NOTICE IS HEREBY GIVEN that Howard Lorenzo Eckersley, James H. Rickard, and Wilbur Sutton Thain, M.D., Respondents/Real Parties in Interest above named, hereby appeal to the Supreme Court of the United States from the decision, opinion and judgment of the Supreme

Court of the State of Nevada in the above-captioned case, filed June 26, 1981. This appeal is taken under 28 U.S.C §1257(2).

DATED: This 30th day of July 1981.

JOLLEY, URGA & WIRTH
and
SHEPPARD, MULLIN, RICHTER
& HAMPTON
By /s/ Roger A. Wirth, ESQ.
ROGER A. WIRTH, ESQ.
302 East Carson, Suite 514
Las Vegas, Nevada 89101
Attorneys for Petitioners/Real
Parties in Interest

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is an employee of Jolley, Urga & Wirth and is not a party to nor interested in the within action; that on the 30th day of July 1981, she mailed a copy of the foregoing Notice of Appeal, by placing said copy in the United States Mail at Las Vegas, Nevada, in sealed envelopes upon which first-class postage was affixed, addressed:

HONORABLE J. CHARLES THOMPSON
District Judge
Eighth Judicial District Court of the State of Nevada
Department I
200 East Carson Avenue
Las Vegas, Nevada 89101

PETER ECHEVERRIA, ESQ.
Echeverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

THOMAS D. BEATTY, ESQ.
Fitzgibbons & Beatty
1829 East Charleston, Suite 104
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Five Park Suite 300
261 South Figueroa
Los Angeles, California 90012

JOHN T. MORAN, ESQ.
Houston, Moran & Kennedy
300 South Fouth, Suite 1212
Las Vegas, Nevada 89101

That there is regular communication by mail between the place of mailing and the places so addressed.

/s/ Judi Herring
JUDI HERRING

Notice of Appeal.

In the Supreme Court of the State of Nevada.

Frank William Gay, Levar Beebe Myler, and John Morrison Holmes, Jr., Petitioners, vs. The Eighth Judicial District Court of the State of Nevada in and for the County of Clark; The Honorable J. Charles Thompson, District Judge; First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr.; William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr.; Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest; and Hughes Properties, Inc., Respondents. Case No. 13012.

Filed August 3, 1981.

To: The Eighth Judicial District Court of the State of Nevada in and for the County of Clark; the Honorable J. Charles Thompson, District Judge; First National Bank of Nevada; William R. Lummis; Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest; and Hughes Properties, Inc., Respondents; and

To: Echeverria & Osborne, Chartered, Fitzgibbons & Beatty, and Parson Behle and Lattimer, attorneys for Respondents/Real Parties in Interest:

NOTICE IS HEREBY GIVEN that Frank William Gay, Levar Beebe Myler, and John Morrison Holmes, Jr., Petitioners above named, hereby appeal to the Supreme Court of the United States from the decision, order and judgment of the Supreme Court of the State of Nevada in the above-captioned case, filed June 26, 1981, and the Writ of Mandate

issued by the Supreme Court of the State of Nevada in the above-captioned case, issued July 24, 1981. This appeal is taken under 28 U.S.C. §1257(2).

DATED: Tnis 30th day of July 1981.

JOLLEY, URGA & WIRTH
and
SHEPPARD, MULLIN, RICHTER
& HAMPTON
By ROGER A. WiRTH, ESQ.
302 East Carson, Suite 514
Las Vegas, Nevada 89101
Attorneys for Petitioners

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/s/ Judi Herring
JUDI HERRING

Notices of Appeal Filed With The Nevada Supreme Court.

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Frank William Gay, Levar Beebe Myler, and John Morrison Holmes, Jr., Petitioners, vs., The Eighth Judicial District Court of the State of Nevada in and for the County of Clark; the Honorable Judge; First National Bank of Nevada, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr.; William R. Lummis, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr.; Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest; and Hughes Properties, Inc., Respondents. Case No. 13012.

To: The Eighth Judicial District Court of the State of Nevada in for the County of Clark; the Honorable J. Charles Thompson, District Judge; First National Bank of Nevada; William R. Lummis; Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest; and Hughes Properties, Inc., Respondents; and

To: Echeverria & Osborne, Chartered, Fitzgibbons & Beatty and Parson Behle and Lattimer, attorneys for Respondents/Real Parties in Interest:

NOTICE IS HEREBY GIVEN that Frank William Gay, Levar Beebe Myler, and John Morrison Holmes, Jr., Petitioners above named, hereby appeal to the Supreme Court of the United States from the decision, order and judgment of the Supreme Court of the State of Nevada in the above-captioned case, filed June 26, 1981, and the Writ of Mandate

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DATED: This 30th day of July 1981.

JOLLEY, URGA & WIRTH
and
SHEPPARD, MULLIN, RICHTER
& HAMPTON
By /s/ Roger A. Wirth,
ROGER A. WIRTH, ESQ.
302 East Carson, Suite 514
Las Vegas, Nevada 89101
Attorneys for Petitioners

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To: First National Bank of Nevada; William R. Lummis; Summa Corporation; Hughes Air Corp., d/b/a Hughes Airwest; and Hughes Properties, Inc., Petitioners; and

To: Echeverria & Osborne, Chartered, Fitzgibbons & Beatty, and Parson Behle and Lattimer, their attorneys:

NOTICE IS HEREBY GIVEN that Howard Lorenzo Eckersley, James H. Rickard, and Wilbur Sutton Thain, M.D., Respondents/Real Parties in Interest above named, hereby appeal to the Supreme Court of the United States from the decision, opinion and judgment of the Supreme Court of the State of Nevada in the above-captioned case, filed June 26, 1981. This appeal is taken under 28 U.S.C. §1257(2).

DATED: This 30th day of July 1981.

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and
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& HAMPTON
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/s/ Judi Herring
JUDI HERRING

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS
CLERK

No. 81-561

IN THE

Supreme Court of the United States

October Term 1981

FRANK WILLIAM GAY, LEVAR BEEBE MYLER, and JOHN MORRISON HOLMES, JR.
Appellants,

vs.

THE EIGHTH JUICIAL DISTRICT COURT of the STATE OF NEVADA, *et. al.*,
Appellees.

HOWARD LORENZO ECKERSLEY, JAMES H. RICKARD and WILBUR SUTTON THAIN, M.D.,
Appellants,

vs.

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of HOWARD ROBARD HUGHES, JR. (Deceased), *et. al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

MOTION TO DISMISS OR AFFIRM

Echeverria & Osborne, Chartered
555 S. Center Street, Reno, Nevada
(702) 323-8678

PETER ECHEVERRIA
GEOFFREY WHITE
NICHOLAS F. FREY

BY PETER ECHEVERRIA
Attorneys For Appellees

(Names and address of attorneys continued on inside cover).

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P.O. BOX 11898
Salt Lake City, Utah 84147
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Attorneys for Appellees

Of Counsel:
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Las Vegas, Nevada 89104
(702) 382-2721

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No. 81-561
IN THE
Supreme Court of the United States

October Term, 1981

FRANK WILLIAM GAY; LEVAR BEEBE MYLER; and JOHN MORRISON HOLMES, JR.,

Appellants,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE; FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIR COPR., d/b/a Hughes Airwest; and HUGHES PROPERTIES, INC.,

Appellees.

HOWARD LORENZO ECKERSLEY; JAMES H. RICKARD; and WILBUR SUTTON THAIN, M.D.,

Appellants,

vs.

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIR CORP., d/b/a Hughes Airwest; HUGHES PROPERTIES, INC.; THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE J. CHARLES THOMPSON, District Judge, Eighth Judicial District Court,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NEVADA

MOTION TO DISMISS OR AFFIRM

The appellees respectfully move this Court to dismiss these appeals or to affirm the decision of the Nevada Supreme Court in this case. Supreme Court Rule 16(1).

If this Court treats the appeal as a petition for a Writ of Certiorari, appellees respectfully submit that a writ should not issue as to these appellants on the grounds set forth in this Motion to Dismiss or Affirm.

STATEMENT OF THE CASE

Nearly three years ago, on January 24, 1979, the Administrators of the Estate of the late Howard Hughes, Jr., and three of Hughes' companies filed a lawsuit in Las Vegas, Nevada, against the "palace guard" of aides, physicians, executives, and attorneys who surrounded Hughes and controlled his businesses during the last years of his life.* These plaintiffs sought to recover damages for a scheme of conspiracy, breach of duty, waste, mismanagement, and negligence.

For more than the last decade of his life, Howard Hughes lived in seclusion. His communications were filtered through his personal aides. With few and only brief exceptions, only the aides and physicians saw Hughes during his later years. Mr. Hughes' vast business holdings (particularly in Nevada) were directed and controlled not by Hughes, but by the defendants, who, the plaintiffs allege, improperly obtained from Hughes (through undue influence or

*The "palace guard" are the 14 named defendants in the underlying action including personal aides to Hughes such as Eckersley, Rickard, Myler, and Holmes, and executive Gay (Myler and Holmes also served as directors) and Dr. Thain, one of the physicians, and Gay's brother-in-law.

other improper means) proxies vesting certain of their number with essentially complete control over the Hughes empire. Among other things, and despite appellants' dogged denigration of plaintiffs' pleadings, plaintiffs' amended pleadings (plaintiffs filed two such amended complaints in Nevada) plainly charged the defendants with (first claim for relief) conspiring to gain and maintain control of Hughes' corporate and personal wealth for their personal use and misappropriation; (second and third claims for relief) obtaining and approving excessive and unfair employment and consulting contracts for themselves; (fourth and fifth claims) wasting and mismanaging and otherwise improperly handling Hughes' Nevada assets including his hotels and casinos; and (sixth claim for relief, charged against the attorney defendants) committing legal malpractice and breach of fiduciary and implied contractual duties owed to the plaintiffs.

In the trial court, plaintiffs submitted *prima facie* evidence of its allegations. The task demanded that plaintiffs provide proof against some 14 defendants for wrong-doing covering a period over ten years in length, without benefit of discovery. *Gardner v. Assoc. Contractors, infra.* It required the piercing of a veil of conspiratorial silence which was particularly effective because of Hughes' isolation for the last decades of his life. The claims required proof as to the mental and physical state of the last ten years of a man now dead, and required the review of hundreds of thousands of documents, and distillation of thousands of pages of deposition testimony from probate actions and other prior proceedings. It required the interviewing of numerous witnesses and the preparation of their affidavits. Plaintiffs submitted some five volumes of evidence, including expert opinion on Hughes' mental condition, authenticated summaries and charts, some 18 affidavits, prior deposition testimony, numerous memoranda to and from Hughes, and other extensive

documentation. Plaintiffs were required to make not merely a *prima facie* showing of the defendants' *minimum contacts* with the forum, but were required to prove every allegation in their complaint with evidence creating a *prima facie* case of *tort liability*. (*J.S. Appellants' Appendix* at A-14.)

Earlier, in June of 1979, the Nevada trial judge had quashed service respecting plaintiffs' original complaint. The suit remained pending since the court did have jurisdiction over three Nevada resident defendants and since the court issued no rule 54(b) certificate, N.R.C.P. Rule 54(b) (which parallels F.R.C.P. Rule 54(b)). The court regarded its decision as interlocutory and ultimately, as these appellants complain now, the Nevada Supreme Court agreed. (*J.S. Appellants' Appendix at A-2 to A-3.*)

On July 9, 1979, two weeks before the entry of the interlocutory orders quashing service of process, plaintiffs amended their complaint, partly to cure an oversight in the jurisdictional allegations which erroneously traced the wrong-doing only from 1978 back to 1972 and omitted reference to numerous jurisdictional acts from 1966 (when Hughes came to Nevada) until 1972. (*Id.*). The amended complaint also named new additional parties.

Subsequently, the three resident defendants filed motions to dismiss based on N.R.C.P. Rule 9(b), claiming that plaintiffs had failed to plead fraud with particularity. Accordingly, largely to cure any potential pleading problems dealing with fraud allegations, plaintiffs in October 1979 moved for leave to file a second amended complaint, which leave was subsequently granted over the opposition of certain defendants. Naturally, this left any jurisdictional questions stemming from the first amended complaint moot. Plaintiffs filed their second amended complaint and served process again upon the defendants, who, in

January 1980, filed new motions to quash. Ultimately, the trial court asserted jurisdiction over appellants Gay, Myler, and Holmes. The Nevada Supreme Court unanimously concurred, and, construing Nevada's long-arm statute N.R.S. 14.065 more broadly than the trial court (a matter not here in controversy), mandated the assertion of jurisdiction over appellants Eckersley, Rickard, and Thain. We respectfully submit that the facts and the law on the issues here involved show no error by the Nevada Supreme Court.

For almost three years this action has been mired in procedural quicksand. Without elaborating, suffice it to say that these appellants and their co-defendants have, among other things, filed (months after plaintiffs filed their claims) no less than ten separate reactive and vexatious actions against Summa in various state and federal courts of Utah, California, and New York; until the Ninth Circuit Court of Appeals vacated the injunction, prevailed upon the federal judge in one of the duplicative actions to enjoin the present appellees from proceeding in Nevada; unsuccessfully petitioned the Nevada Supreme Court to stay this action; unsuccessfully petitioned Justice Rehnquist to stay this action; then after the stay petitions failed, unsuccessfully sought (nearly three years after plaintiffs filed the action) to remove the action to federal court in Nevada upon the basis of decidedly specious removal papers, and, after the federal judge remanded the action to state court, orally petitioned that same federal judge to stay the proceedings or to transfer them in any event. (See Appellees' Appendix at A-54 to A-68). The upshot of all this is that these appellants have sought at all costs to avoid trial in Nevada, and the present meritless appeal merely continues that strategy. This Court, we respectfully suggest, should dismiss the appeal or affirm the decision of the Nevada Supreme Court and adjudge to appellee the reasonable damages for their delay, and double costs, pursuant to 28 U.S.C. §2103.

MOTION TO DISMISS

I

THE QUESTIONS PRESENTED BY THIS PURPORTED APPEAL WERE NEVER RAISED BY APPELLANTS BEFORE EITHER THE NEVADA TRIAL COURT OR THE NEVADA SUPREME COURT.

Though appellants now argue that the case below is directly appealable as involving a challenge to the validity of a statute "as applied" to their particular situation (Jurisdictional Statement at 3, hereafter "J.S."), the record reveals that this is the first occasion that appellants have argued that Nevada's "long-arm" statute, Nevada Revised Statute 14.065, is unconstitutional as applied to them. Until now, their contention has always been that the effect of the state court's exercise of jurisdiction — by employing a *prima facia* burden of proof at the jurisdictional stage and by failing to accord *res judicata* effect to an interlocutory order quashing service of process — deprived these appellants of federal due process. Appellees append relevant portions of the appellants arguments below which demonstrate that appellants have not heretofore attempted to tie their burden of proof and *res judicata* arguments to the statutes themselves. (Appellees' Appendix at A-1 to A-46). The opinion of the Nevada Supreme Court (J.S. appellants' Appendix A at A-5 to A-7) demonstrates that the Court relied on Nevada case law and did not interpret the statute. The language of the statutes which appellants rely upon (J.S. at 6-8) simply does not refer, explicitly or implicitly, to burden of proof or finality. Thus, the trial court did not interpret or apply N.R.S. §14.065 or Nevada Rules of Civil Procedure Rule 12(b) in its decision below and the Nevada Supreme Court was not, as appellants argue, "faced squarely with the issue(s)" now before this Court. (J.S. at 4).

The four cases relied upon by appellants (J.S. at 3) do support appellants general proposition that appellate jurisdiction will lie to challenge the validity of a statute as applied. However, in each of these cases the appellant properly raised the voidness of the statute itself, as applied, in the state court. As stated in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-89 (1921):

> (I)n the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, *but distinctly insisted that as to the transaction in question the Kentucky statute was void*, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court. . . applied and enforced the statute. Of course, that was an affirmation of its statute when so applied.

See also *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 686 (1965) (Appellant claimed (below) that *as applied*. . . state tax was invalid"); *Bantam Books, Inc. v. Sullivan*, 373 U.S. 58, 61 n.3 (1963) (state court judgment "upheld a state statute against the contention that, on its face and as applied, the statute violated the Federal Constitution.").

Thus, appellants' attempt to invoke this Court's mandatory jurisdiction must fail, and the appeal should be dismissed, because "in the state court appellants did not object that the statute(s) (were) invalid as applied, but rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case (using the *prima facie* standard of proof and giving no *res judicata* effect to a prior order quashing service) deprived them of a right, under the Federal Constitution." *Hanson v. Denckla*, 357 U.S. 235, 242 (1958).

II
THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION OF SIGNIFICANT NATIONAL IMPORT TO WARRANT THIS COURT'S REVIEW.

Appellants' constitutional objections are two-fold. First, they asserted below that a prior interlocutory order quashing service of process should forever bar the state of Nevada from assuming jurisdiction over them, on the ground of *res judicata*. Second, they argued that the burden of proof to determine jurisdiction should be a preponderance of the evidence. Two state trial court judges and a unaminous Nevada Supreme Court rejected each of these contentions. (J.S., appellants' appendix A at A-1 to A-10 and A-11 to A-17.) Both issues turn on state procedural law. The federal due process right asserted by appellant is only tangentially, and not substantially, involved here. *Garrity v. State of New Jersey*, 385 U.S. 493, 495 (1967).

Regarding the *res judicata* issue, this Court has held, in the context of an assertion by a bar applicant that the California Supreme Court had refused to give a prior U.S. Supreme Court decision requisite finality in that state court proceeding, that "principles of finality protecting the parties to this state litigation are, within broad limits of fundamental fairness, solely the concern of California law. Such limits are broad even in a criminal case (citations omitted). In this instance they certainly have not been transgressed by the State's merely taking further action in this essentially administrative type of proceeding." *Konigsberg v. State Bar of California*, 366 U.S. 45 (1961). It is apparent that, despite clever phrasing of the question in the appellants' Jurisdictional Statement, the issue of what finality to accord an order quashing service is a non-federal matter. Appellants' attempt to invoke mandatory review (or even discretionary review) of the *res judicata* issue, as

well as the very statement of the question itself is disingenuous at best.

The issue of finality presented for review (Question 2) is defective in several respects. First, it assumes that "Nevada statutes," namely N.R.S. 14.065, and "rules of procedure," namely Nevada Rules of Civil Procedure Rule 12, have been "interpreted and applied" by the Nevada Supreme Court and lower state courts. (J.S. at i, 2-3). A quick perusal of each of those statutes leads to the inescapable conclusion that when the lower courts ruled on the *res judicata* issue they were simply not interpreting and applying these statutes.

Just as appellants' arguments below rested on non-federal grounds, the Jurisdictional Statement reveals no manifest need for this Court to create a federal right under the 14th Amendment to constitutionally immunize a non-resident defendant from service of process on a subsequently amended complaint once an interlocutory order quashing service on the original complaint has been rendered in his favor. Appellants supply no decisions whatsoever pointing to a need to create such a federal right.

Regarding the burden of proof issue, appellees respectfully submit that this, too, is essentially for the State courts to decide, and does not involve a substantial federal question warranting review by this court. Neither the Nevada "long-arm" statute, nor N.R.C.P. 12(b), set forth what burden of proof a state court should impose at the initial jurisdictial stage of the action, nor has either been applied to determine the burden of proof issue. Rather, as the arguments made below make clear, the burden of proof at the jurisdictional stage is grounded on state case law and precedent, and appellants have never argued until now that the matter of this burden involved the statute itself.

Thus, the burden of proof issue, properly framed, is simply whether or not a sovereign state may choose what standard of proof to employ at the initial jurisdictional stage of a trial. This determination, as well as other evidentiary rulings at the state court level, has consistently been accorded great deference by this Court. *Cleveland, C.C. & St. Louis Railway Co. v. Barley*, 154 U.S. 439, 443 (1894); *Bell Telephone Co. v. Pac. Pub. Utility Comm'n.*, 309 U.S. 30, 32 (1940). When this Court has chosen to rule on the burden of proof issue, it has done so only in the context of its interpretation of a *federal* statute, and where "the burden of proof (was) so connected with the substantive rights given to the respective parties by the statute - (and) indeed so flow(ed) from the words of the statute." *Hill v. Smith*, 260 U.S. 592 (1923). Such is not appellants' case.

Appellees submit that the burden of proof issue is not a substantial federal question for this Court to decide.

MOTION TO AFFIRM

Alternatively, the appellees FNB, *et. al.*, move this Court to affirm the decision of the Nevada Supreme Court.

I.

NEVADA'S RULE PERMITTING AMENDMENT OF A COMPLAINT BEFORE THE ENTRY OF ANY FINAL ORDER FOLLOWING AN INTERLOCUTORY DECISION QUASHING SERVICE OF PROCESS DID NOT VIOLATE DUE PROCESS.

On December 19, 1979, the Nevada trial court granted appellees leave to file the Second Amended Complaint. The appellants afterward filed new motions to quash arguing that the trial court's earlier decision of June 8, 1979, quashing service of process over the defendants, constituted an estoppel by judgment determining once and for all that the State of Nevada has no personal jurisdiction over these non-resident defendants for

causes of action alleged by appellees. Ultimately, like that trial court, the Nevada Supreme Court held that no *res judicata* effect attached, stating:

> An order quashing service of summons may be attacked only through a writ of mandamus. *Jarstad v. National Farm Union*, 92 Nev. 380, 552 P.2d 49 (1976). It is not a judgment as defined in our rules of civil procedure: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." N.R.C.P. 54(a). The time limit for filing an appeal, N.R.A.P. 4(a), does not pertain to a writ of mandamus; this extraordinary remedy is subject to the doctrine of laches. *Buckholdt v. District Court*, 94 Nev. 631, 584 P.2d 672 (1978). An order quashing service of summons is not treated as an appealable final judgment under our rules of civil procedure. (J.S. appellants' appendix A A-5).

The Court reasoned that, "Petitioners (appellants here) rely on a number of cases which find a direct estoppel to exist on a jurisdictional issue once decided. (Citations omitted.) However, in each of these cases the order quashing service was directly appealable and it became a final judgment." (*Id.* at A-6). Accordingly, because the June 8, 1981 decision quashing service had not been final, the Nevada Supreme Court held that the district court had not erred in refusing to apply the *res judicata* doctrine.

In June of 1979, after the trial court quashed service of process, three Nevada residents still remained as defendants in the action. The trial court issued no Rule 54(b) certificate. N.R.C.P. Rule 54(b), either on its own motion or upon an application by the appellee/plaintiffs. Rule 54(b), like the federal rule which it copies, expressly contemplates the trial court's reconsideration of a ruling in an action as this, involving multiple claims and multiple parties, at any time before a final judgment. Moreover, even before the entry of the

interlocutory orders stemming from that decision quashing service, plaintiffs had filed an amended complaint.

Nevada's procedure regarding the interlocutory nature of an order quashing service is not remarkable. Numerous other courts have applied precisely the same procedure in circumstances nearly identical to these. (*See* also Restatement of Judgments §44). For instance, in *GMS Properties, Inc. v. Superior Court*, 219 Cal.App.2d 407, 33 Cal.Rptr. 163 (1963), the Supreme Court of California held that a successful motion to quash did not bar litigation of jurisdictional questions after amendment of the complaint. "(Q)uashing of service of the first summons did not result in the question of jurisdiction becoming *res judicata* for the reason that no judgment of dismissal followed the ruling and that through additional allegations in the second amended complaint, the situation was changed so that there then was an adequate pleading." 219 Ca. App. 2d at 410, 33 Cal.Rptr. at 166. In *accord, see Stevens v. Security Pacific National Bank*, 538 F.2d 1387, 1388 (9th Cir. 1976); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 77 (5th Cir. 1961) (the trial court was directed to allow amendment to cur jurisdictional defects; no prejudice had resulted as to preclude the granting of leave to file an amended complaint, even though the defendant had been required to do extensive research to prepare a trial brief and even though the trial court had expended its time and energies); *American Broadcasting Co. v. Wahl Co.*, 121 F.2d 412, 413 (2nd Cir.

1941) (order not final where leave to amend is granted*). None of these decisions even hint that any constitutional deficiency may exist in the procedure adopted by Nevada; indeed, they would not so hint since the Nevada practice is analogous to the sustaining of a demurrer with leave to amend, a practice sustained without question through hundreds of years of practice.

Appellants persist in contending that in Nevada a plaintiff may litigate the issue (of jurisdiction) *ad infinitum"* (J.R. at 11), and refer to the possibility of a plaintiff's making a *prima facie* showing of jurisdiction upon the "hundredth litigation of the issue." (J.S. at 20). Appellants' contention has no basis in reality. Additional amendments of a complaint are not a matter of right but are granted within a trial judge's discretion. N.R.C.P. Rule 15(a). As the trial judge in the instant action himself made clear in granting plaintiffs' motion for leave to amend, Nevada courts simply will not permit repeated amendments without good cause. Indeed, he granted leave upon the express condition that no further amendments would be permitted except upon the showing of "extraordinary cause." (Reporters transcript of Proceedings, November 20, 1979, Appendix A

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*See also *Haley v. Simmons*, 529 F.2d 78, 79 (8th Cir. 1976) (court which grants motion to quash but does not dismiss action "retained jurisdiction for purposes of allowing further attempts to serve process); *United States v. Desert Gold Mining Co.* 433 F.2d 713, 715 (9th Cir. 1970) (order granting partial summary judgment was subject to "reconsideration and revision" by "the same judge, a successor judge or a different judge to whom the case might be assigned"). Nor is the court bound to follow the June 1979 decision as "law of the case." That doctrine is purely discretionary, and the court may reexamine its decision until final judgment (*See, Hill v. United States Fidelity and Guaranty Co.*, 428 F.2d 112, 115 (5th Cir. 1970) and 400 does not apply where, as here, the facts and issues before the court have changed. *See, Petition of Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 825 n.9 (2d Cir. 1968). Finally, "it is questionable whether (law of the case) ever applies unless the (first determination) affects the merits." *Buling v. United States*, 231 F.3d 926, 928 (9th Cir. 1956).

at A-48). The arguments of the Gay parties that the court's discretion constitutes no limitation upon the number of times a party may replead and, accordingly, upon the number of times a defendant will be required to resist jurisdiction by motion, posits the entirely unacceptable premise that the courts of Nevada cannot be trusted to wisely and fairly exercise their discretion. The defendants thus offer a slim excuse for interference with Nevada public policy and procedure, particularly since, even if endless amendment were permitted in Nevada, no such abuse occurred in their case.

Appellants exclaim that the unfairness of Nevada's rule "could not be more obvious and compelling." (J.S. at 21). They cite, as a standard for measuring that unfairness, *Davis v. Wechsler*, 263 U.S. 22 (1923). That case stands for the proposition, with which appellees agree, that a state may not set springes in the guise of procedural rules to defeat plain constitutional rights. In ruling that an order quashing service of process is in Nevada an interlocutory order, the Nevada Supreme Court as well as the trial court did not act capriciously, arbitrarily, or otherwise in any manner offensive to due process. Nevada set no springe in this instance. The Nevada courts simply provided plaintiffs the opportunity, the first time they amended, to correct defects and oversights in their jurisdictional allegations, and, the second time they amended, to correct potential Rule 9(b) deficiencies (failure to plead fraud with specificity) in order to resist certain defendants' motions to dismiss. In each instance, the appellants were free to contest jurisdiction through proper motions to quash, although this likely entailed some additional cost (even though their subsequent papers traced their first nearly word for word). That falls far short of the unfairness necessary to constitute a violation of due process.

The instant appeals have a striking factual contrast to *Brinkerhoff - Faris Trust and Savings Company v. Hill*,

281 U.S. 673 (1930). There the state had overruled its earlier decisions making a suit in equity to enjoin collection the only remedy against a discriminating tax violative of the equal protection clause, and then denied this remedy upon the ground that the party seeking it should first have exhausted an administrative remedy *which was earlier unavailable* and, under the overruling decision, was too late for him to invoke. This Court found that springe to violate due process, and no wonder. As this Court held, at 454:

> (W)hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Nevada never deprived the appellants "of all existing remedies for the enforcement of (their jurisdictional) rights," but instead provided them a full opportunity to air their jurisdictional objections through a motion to quash.

Davis v. Wechsler, 281 U.S. 673 (1970), appears to rest upon the same principle. In that case this Court held that the mere required formality of substituting a new director general of railroads could not serve to waive the plea as to venue, where the substituted defendant fairly contemporaneously adopted that previously filed plea. The state's procedure effectively destroyed all opportunity for any substituted director general of railroad to protect his objection to venue, pursuant to the federal General Order 18-A. That state springe closed on the defendant *regardless* of what he did. Again, in the instant action, Nevada afforded much more than the illusory protection involved in *Wechsler*.

Finally, one last decision, *Monger v. Florida*, 405 U.S. 958 (1972), helps define the parameters beyond which a state may not go in setting state procedure. In *Monger* this Court dismissed a criminal appeal because "the notice of appeal. . . was filed prior to entry of either judgment or sentence." The technicality and state policy involved in *Monger* (which manifestly involved more eggregious circumstances than those in the present appeal) certainly served a less important purpose than the procedure involved here. Nevada's procedure permits a plaintiff, if he acts timely, to cure defects in a pleading wherever circumstances would make it just, N.R.C.P. Rule 15(a), (for example, to help cure defects in pleading fraud). That opportunity to amend would be meaningless if the plaintiff could not then re-serve a defendant with process.

In short, the appellants suffered no real hardship under the Nevada rule, certainly none of a constitutional dimension. This Court need not rewrite Nevada's procedure permitting amendment of pleadings and defining what orders will be accorded finality.

II.

DUE PROCESS DOES NOT REQUIRE THE NEVADA TRIAL COURT TO HAVE EMPLOYED A HEAVIER BURDEN IN DECIDING THE JURISDICTIONAL QUESTIONS THAN IT DID: A *PRIMA FACIE* SHOWING OF PETITIONERS' TORTIOUS CONDUCT WITHIN NEVADA SUFFICES TO WARRANT THE EXTENSION OF JURISDICTION.

The Nevada Supreme Court ruled that, "When a challenge to personal jurisdiction is made, the plaintiff in the action has the burden of establishing the existence of jurisdiction. *Basic Food Indus., Inc. v. District Court*, 94 Nev. 111, 575 P.2d 934 (1978)." (J.S. appellants' Appendix at A-6). The court held that a plaintiff meets

this burden "by competent evidence of essential facts which establishes a prima facie showing of the existence of in personam jurisdiction. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); *Harvell v. District Court in and For County of Jefferson*, 444 P.2d 629 (Colo. 1968)."

The appellants' articulation of the nature of plaintiffs' burden distorts its true character. When appellants moved to quash, and denied plaintiffs' allegations (albeit they did so in conclusary fashion), appellees were obliged to come forward with proof. In Nevada, a plaintiff may and plaintiffs did meet this burden by affidavit or otherwise. *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977), cited and approved by the Nevada Supreme Court in *Basic Food Industries, supra*. It was upon the basis of that evidentiary showing that the Nevada courts ruled, so far as the jurisdictional issue was concerned, that the appellants had "committed tortious acts" in Nevada from which plaintiffs' claims arose. If and when the opposing affidavits and other evidence raised a genuine issue of fact, the trial court, employing a standard akin to the one for summary judgment,* disregarded Petitioners' evidence only because it was unwilling at this initial stage to weigh evidence and engage in a trial by affidavit. The defendants were free to dispute the inferences plaintiffs drew from the evidence, to challenge the rationality of those inferences, to point to any dearth of evidence necessary to support plaintiffs' jurisdictional allegations, to challenge the admissibility and competency of Respondents' evidence, and to otherwise challenge the sufficiency of Plaintiffs' *prima facie* showing, and this they did. However, they were not free to force a trial by affidavit.

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*See *Gemini Enterprises v. WFMY Television Corporation*, 470 F. Supp. 559, 565 n.4 (M.D.N. 1979).

The trial court, in its decision on November 7, 1980, described the burden of proof in these terms:

> When the factual allegations of the complaint are controverted by affidavit, as they now are in this case, the plaintiff then has the burden to present *prima facie* evidence of the commission of the tortious act in Nevada. In fact, the plaintiff must present *prima facie* evidence that each moving defendant committed a tortious act in Nevada. [J.S. Appellants' Appendix at A-13]

The Court considered and rejected Petitioners' demand for a heavier burden of proof on the jurisdictional issues:

> I could never agree with the procedure that requires a judge to weigh evidence and decide on the credibility of witnesses based upon conflicting affidavits. You simply can't have a trial on the motion to quash and take testimony. If you do, we'd have two trials in the case. Thus, once the complaint or the allegations in the complaint are controverted by affidavit, then the defendants' affidavits are to be disregarded; they disappear, and it's the plaintiffs' *prima facie* showing that the Court must look to to determine whether the burden of proof has been met in satisfying the long arm statute, or 14.065. [*Id.*]

Cf. McLaughlin v. Copeland, 435 F. Supp. 513 (D. Md. 1977) (discussing more clearly a procedure comparable to that adopted in Nevada and holding, *inter alia*, that where the complaint's allegations are not specifically denied by affidavit, they must be taken as true; if denied, plaintiff must make a *prima facie* showing).

A plaintiff's burden to show a permissible basis for the exercise of jurisdiction is not heavier than a *prima facie* showing because, among other reasons, questions of *in personam* jurisdiction so often implicate themselves with the merits of the action itself. *See, United States v.*

Montreal Trust Co., 358 F.2d 239, 242 (2d Cir. 1966), *cert. den.* 384 U.S. 919 (1966); *Gemini Enterprises v. WFMY Television Corp.*, 470 F. Supp. 559, 565 n.4 (M.D.N.C. 1979) ("Where the long-arm statute is co-extensive with the limits of due process, a *prima facie* showing may be made by showing jurisdictional facts which supply the minimal contacts required by due process. Using a standard which is akin to the one for summary judgment, the Court should grant the motion to dismiss if there is no genuine issue as to any material jurisdictional fact and the jurisdictional defect appears as a matter of law."). In this action the jurisdictional issue (did Defendants commit tortious acts in Nevada) was manifestly intertwined with the merits. However, despite the fact that N.R.S. 14.065 is as "broad as," or is coextensive with the constitution, appellees went further than showing mere minimal contacts. Rather, appellees gave *prima facie* proof of the commission of tortious acts themselves in Nevada. Appellees surpassed the obligation imposed by many courts. They were compelled by the Nevada Court to place before it extraordinary quantities of evidence, including affidavits, testimony from other cases, memoranda and business records, expert testimony, and authenticated charts and summaries. Respondents' materials composed some five volumes of evidence as well as a lengthy memorandum. Yet, appellants complain that this burden was not enough.

Davis v. Wechsler, 263 U.S. 22 (1923), and other of this Court's decisions in that line, certainly do not mandate the heavier burden of proof demanded by the Petitioners. The procedure Judge Thompson adopted strikes a fair and reasonable balance between the burdens placed on Plaintiff and Defendant. The prohibition in Nevada of taking discovery prior to the assertion of personal jurisdiction and the other limitations placed on a Nevada plaintiff justify the imposition of a lower burden of proof. *Gardner v. Assoc.*

Contractors, 72 Nev. 1, 291 P.2d 1051 (1956). A trial court is not bound by obviously false or perjured testimony, but neither is it bound to weigh evidence in circumstances which would make the determination unfair.* After all, appellees had no right below to conduct any discovery on the jurisdictional issues, nor opportunity to cross-examine the defendants to respond to any *new* assertions of fact or law contained in defendants' final papers below on the jurisdictional question, nor to provide any explanation of defendants' mischaracterization of plaintiffs' evidentiary showing. Nor could the court *fairly* (and this would harm plaintiffs more than defendant) evaluate the credibility of witnesses on the basis of affidavits alone. Yet appellants demand just that, as a matter of constitutional law. The *prima facie* burden strikes a fair balance in the full context of Nevada procedure, and additionally does not unreasonably tax the Nevada courts' resources of time, energy, and money which would have to be expended to weigh evidence on every jurisdictional objection and in effect try cases twice.

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*Cf. *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977) (emphasis added):

> If the court determines that it will receive only affidavits or affidavits plus discovery materials, (footnote omitted) *these very limitations dictate that a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss* (for want of personal jurisdiction). Any greater burden — such as proof by a preponderance of the evidence — would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials. Thus a plaintiff could not meet a burden of proof requiring a preponderance of the evidence without going beyond the written materials. *Accordingly, if a plaintiff's proof is limited to written materials, it is necessary only for the materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.*

Appellants' constitutional argument furthermore suggests no limitations and likely would permit of none. To sustain their line of reasoning could lead just as reasonably, for example, to the constitutional requirements in Nevada at the hearing on jurisdiction of a full-blown right to discovery or to a right to a jury determination of disputed issues of fact. Not only would this extinguish the special/general distinction in Nevada, and force this Court to entirely rewrite Nevada procedure respecting *in personam* jurisdiction, but Appellants' logic would impose impossible burdens upon a Nevada plaintiff at only a preliminary stage of the litigation. This Court's prior decisions, including *Wechsler*, clearly confirm that this Court is not constitutionally obliged to impose so unreasonable a procedural burden upon a Nevada plaintiff. Appellants should not be permitted, to convert the jurisdictional inquiry into a "trial by affidavits." *Hanson v. Murphy*, 491 P.2d 551, 556 (Kan. 1971). Otherwise, as one of the Nevada trial judges said, when he rejected the appellants' argument; requiring plaintiffs to make out more than a *prima facie* case would permit "every out-of-state defendant (to) easily escape from the long-arm of Nevada courts." (Decision of Judge Goldman, June 8, 1979, Appendix A at A-52.) Thus, appellees submit that appellants' arguments on this issue are not meritorious.

CONCLUSION

The cases and controversies over which this honorable Court notes probable jurisdiction or grants certiorari are usually those appeals or petitions raising substantial federal questions of great public concern. The questions presented by appellants, however, arising out of the unique circumstance of tracing 15 years of the life of Howard Hughes, Jr., and detailing the various and theretofore undiscovered wrongs perpetrated by 14 defendants are chiefly of consequence in this unique

factual setting where several defendants are sued for a course of conduct spanning many years. Moreover, the questions were not properly raised below and are not properly framed here.

Though appellants continue to mischaracterize the nature of the evidence against them, exaggerate the nature of their own evidentiary showing, plaintiffs below carefully and laboriously showed that Howard Hughes, Jr., and his companies were indeed victims of an extraordinary scheme centered largely in Nevada.

These appellants, who argue about the inconvenience caused them by a trial in Nevada, find it convenient to cross the country filing complaints and motions which serve to fragment and disrupt the first-filed Nevada action (where all claims could be heard in a single forum) present an appeal unworthy of this Court's review. This Court should therefore dismiss it (or deny certiorari). Alternatively, for the reasons set forth herein, the Court should affirm the decision of the Nevada Supreme Court.

Dated: October 16, 1981.

Respectfully submitted,

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* * *

APPENDIX A

[EXCERPT OF BRIEF]

Case No. A 185995
Dept. No. X
Docket: "K"

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIR CORPORATION, d/b/a Hughes Airwest, and HUGHES PROPERTIES, INC.,

Plaintiffs,

—vs—

FRANK WILLIAM GAY, CHESTER C. DAVIS, NADINE HENLEY MARSHALL, DAVIS & COX, a partnership, MAXWELL E. COX, HOWARD M. JAFFE, D. MARTIN COOK, KAY GIBBONS GLENN, LEVAR BEEBE MYLER, JOHN MORRISON HOLMES, JR., CLARENCE ALBERT WALDRON, HOWARD LORENZO ECKERSLEY, JAMES H. RICKARD, WILBUR SUTTON THAIN, M.D., JOHN DOES ONE THROUGH SIX, AJAX CORPORATIONS ONE THROUGH SIX; and ABLE & BAKER PARTNERSHIPS ONE THROUGH SIX,

Defendants.

MOTION TO QUASH SERVICE OF PROCESS AS TO DEFENDANTS GAY, ECKERSLEY, RICKARD, MYLER, HOLMES AND THAIN

Defendants Frank William Gay, Howard Lorenzo Eckersley, James H. Rickard, Levar Beebe Myler, John Morrison Holmes, and Wilbur Sutton Thain move the court for an order quashing service of process upon them herein, upon the grounds and for the reason that this court lacks jurisdiction over them and this court's decision of June 8, 1979 is a direct estoppel on the question of personal jurisdiction.

This motion is made and based upon the points and authorities and affidavits previously filed herein, additional affidavits of these moving defendants filed herewith, the points and authorities attached hereto, and the pleadings and papers on file herein.

SHEPPARD, MULLIN, RICHTER, & HAMPTON
and
JOLLEY, URGA & WIRTH
BY/s/Roger A. Wirth,
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302 East Carson, Suite 514
Las Vegas, Nevada 89101
Attorneys for Defendants:
Gay, Eckersley, Rickard,
Myler, Holmes and Thain.

POINTS AND AUTHORITIES
I.
INTRODUCTORY STATEMENT

These defendants' motions to quash in regard to plaintiff's original complaint were granted because, as this court indicated in its written decision, the causes of action alleged in that complaint did not arise from torts allegedly commited by these defendants, or business allegedly transacted by them within the State of Nevada. Indeed, as this court noted at Page 4 of its decision, the *specific* allegations of the original complaint included only activities occurring primarily outside Nevada, after 1972.

Although the Second Amended Complaint filed November 28, 1979 is much bulkier and contains more paragraphs that the original complaint, comparison of the two complaints readily reveals that the three "counts" contained in the first complaint have merely been broken down into separate claims for relief embodying the same alleged wrongs — merely described with more detail. Plaintiffs still complain basically regarding employment and consulting agreements, misappropriation of properties of Mr. Hughes and his corporations, and bad business management decisions, all accomplished through an alleged conspiracy.

The new complaint adds no new legal claims and, although additional detail is added, it continues the basic failure of the first complaint — it fails to link the alleged legal wrongs sued upon with alleged overt wrongful acts committed in the State of Nevada.

II.
PLAINTIFFS MAY NOT RELITIGATE THE QUESTION OF THIS COURT'S JURISDICTION OVER THESE DEFENDANTS UPON THE CLAIMS ASSERTED.

As noted above, analysis of the Second Amended Complaint reveals that the claims presented are the same claims for relief presented in the original complaint. This court has already determined that these moving defendants are not subject to suit in the State of Nevada upon those claims for relief.

In this court's decision of June 8, 1979, this court determined that Defendants Eckersley, Rickard, Gay, Myler, Holmes and Thain are not subject to suit in the State of Nevada upon the claims for relief asserted in the complaint. Alluding to the inartfulness of the original complaint and the breadth of the "matrix" which the complaint presented, the court concluded on page 26, line 8 that:

> As to any and all other causes of action which might be extricated from the complaint by dint of imagination, the defendants Motions to Quash are granted.

Plaintiffs did not choose to seek review of this court's decision by the Nevada Supreme Court. Instead, they chose to proceed by way of amended complaints. Because those amended complaints present the same claims presented by the original complaint or "which might be extricated from the complaint by dint of imagination..." plaintiffs may not relitigate the question whether these defendants are subject to this court's jurisdiction upon those claims. Instead, they must proceed against these defendants in an appropriate jurisdiction in which personal jurisdiction of these defendants may be obtained.

A strikingly similar situation was presented to the court in *Radakovich v. Weisman*, 359 A.2d 426 (Pa.Super. 1976). There, Raymond Radakovich and Allan Frank commenced an action against Leonard Weisman and Weiscorp, Inc. in an Allegheny County court. The complain alleged tortious interference with a business relationship. Weisman, a resident of New York, and Weiscorp, Inc., a Delaware corporation having its principal place of business in New York State, filed preliminary objections to the court's jurisdiction and those objections were sustained. Plaintiffs did not appeal from the order of the court holding that it was without personal jurisdiction over the defendants, but, instead, continued to litigate the case. Defendants filed a petition for a declaratory judgment, requesting the trial court to declare that it lacked jurisdiction over them and further requested a motion for a protective order regarding discovery. The trial court held that the petition constituted a general appearance and defendants appealed. On appeal, the Superior Court of Pennsylvania reversed the trial court order. Citing Section 49 of the Restatement of Judgments, the court concluded:

> Thus, when the judgment is based on lack of jurisdiction of the court over the defendant, as in the instant case, the plaintiff, while not precluded from maintaining a new action based on the same underlying cause of action, is precluded from relitigating the issue of lack of jurisdiction over the defendant. 359 A.2d at 431.

The court ruled that the first decision upon jurisdiction was a direct estoppel against relitigation of that question.

The conclusion of the Pennsylvania court is in accordance with the position apparently taken by the Nevada Supreme Court. In *Alitalia-Linee Aeree v. District Court*, 92 Nev. 638, 556 P.2d 544 (1976), the

plaintiff's complaint was dismissed in the United States District Court for the District of Nevada on the basis of lack of personal jurisdiction of the defendant. The plaintiff then filed a new complaint, in state court, apparently asserting the same claims. The state court denied a motion to quash service of process and the defendant filed a petition for writ of prohibition with the Nevada Supreme Court. The court granted that petition, noting that the plaintiff could not, in lieu of seeking appellate review of the United States District Court's order, challenge it, in effect, by a collateral proceeding.

Here, plaintiffs were given ample opportunity to respond to the various motions to quash presented in response to their initial complaint. By the time they presented their response to the motion to quash, they had invested approximately a year in investigating the subject matter of the complaint and, as this court is well aware, had used the services of a number of prominent law firms. Their response, filed on or about March 13, 1979, is approximately one inch thick. Despite their opportunity to fill in the gaps left by the complaint, and to present to this court by way of affidavits specific wrongful activity of these defendants which would subject them to the jurisdiction of this court, plaintiffs failed to do so to the satisfaction of this court. Instead, plaintiffs are before the court seeking to relitigate the very question presented to this court nearly one year ago, having chosen to ignore the suggestion of this court, "that the burden on a plaintiff to sue in several places of $50 million claims is relatively small." (Decision, June 8, 1979, page 17.) It is respectfully requested that this court direct plaintiffs — again — to proceed against these defendants in the appropriate forums, if they wish to proceed.

* * *

[EXCERPT OF BRIEF]

Case No. A 185995
Dept. No. I
Docket No. J

**IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK**

* * * * *

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIR CORP., d/b/a/ Hughes Airwest, and HUGHES PROPERTIES, INC.,

Plaintiffs,

—vs.—

FRANK WILLIAM GAY, CHESTER C. DAVIS, NADINE HENLEY MARSHALL, DAVIS & COX, a partnership, MAXWELL E. COX, HOWARD M. JAFFEE, D. MARTIN COOK, KAY GIBBONS GLENN, LEVAR BEEBE MYLER, JOHN MORRISON HOLMES, JR., CLARENCE ALBERT WALDRON, HOWARD LORENZO ECKERSLEY, JAMES H. RICKARD, WILBUR SUTTON THAIN, M.D., JOHN DOES ONE THROUGH SIX, AJAX CORPORATIONS ONE THROUGH SIX, and ABLE & BAKER PARTNERSHIPS ONE THROUGH SIX,

Defendants.

**DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO QUASH**

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* * *

3. The Doctrine Of Res Judicata (Direct Estoppel) Prohibits Summa From Relitigating The Issue Of Jurisdiction Decided By Judge Goldman.

How many times do defendants have to resist the jurisdiction of this Court? Why did Judge Goldman so painstakingly analyze the last motion? We have already pointed out in our motion filed January 30, 1980 (p. 3-6), that because analysis of the Second Amended Complaint reveals that the claims presented there are the same claims for relief presented in the original complaint, this Court's previous determination that these moving defendants are not subject to this Court's jurisdiction is dispositive and the jurisdictional issue may not be relitigated.* In short, under the doctrine of "direct estoppel" (which is described by Restatement of Judgments, Section 45, comment *d* (1942) as a limited application or *res judicata*), Summa is barred from relitigating the issue of jurisdiction. (It must be emphasized that these defendants do not assert that this Court's previous determination precludes Summa from pursuing the allegations of the complaint in an appropriate forum, where these defendants are subject to the court's jurisdiction, such as United States District Court for the Central District of California. It is merely their position that the issue of jurisdiction, having once been determined in this action, is not subject to continued relitigation, as Summa adds facts to its complaint from time to time.)

Indeed, the conclusion that Summa may not relitigate the issue of this Court's jurisdiction over these

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*Judge Goldman's decision notes, at page 26, that the Court had carefully examined the complaint so as to address all causes of action, including those "which might be extricated from the complaint by dint of imagination..." The Second Amended Complaint merely adds more detail regarding the post-1972 activities (already the subject of the first complaint) and describes additional activities before 1972, none of which can be the basis of action against these defendants in Nevada.

defendants is supported by a number of cases in addition to those cited in these defendants' opening points and authorities — including a decision of the California Court of Appeals announced May 28, 1980. *MIB, Inc. v. Superior Court of Los Angeles County*, Cal. App. 3rd , 80 Daily L. Jr. D.A.R. 1440 (Cal. App. 1980), a copy of which is attached to the Murphy affidavit as Exhibit 1. That case is remarkably similar to the instant case. The plaintiffs contended that earlier quashing of service by the Los Angeles Superior Court and United States District Court for the Central District of California did not bar their later case, also commenced in the Los Angeles Superior Court. They claimed they had discovered new evidence, had pleaded new causes of action, and had added additional defendants. The lower court declined to accord the previous rulings *res judicata* effect but the Court of Appeals reversed and directed entry of a new order quashing the service of process.

In *MIB, Inc.*, as here, there had been no change in the defendant's relationship to the forum subsequent to the earlier decisions quashing service and the court concluded that even though the plaintiffs contended they had made a stronger showing based upon newly-discovered evidence and had pleaded new causes of action, the new complaint still alleged causes of action arising out of the same course of conduct as that complained of in the earlier complaints. The court relied on Restatement of Judgments, Section 49, comment *b* (1942), which states:

> "(b) *Effect of judgment as to issues decided.* Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action."

The court in the *MIB, Inc.* case found it immaterial for *res judicata* purposes that the plaintiff had tried to make cosmetic changes in the complaint.

> "The causes of action alleged in the current complaint arise out of the same course of conduct as that complained of in the first three complaints. It is immaterial that the plaintiffs have embellished the present complaint to invoke legal theories not articulated in the earlier versions."
> 80 Daily Journal D.A.R. at 1441.

The Supreme Court of New Hampshire reached the same conclusion in *Archie v. Piaggio*, 245 A.2d 76 (N.H. 1968). The motion to dismiss for want of personal jurisdiction had been granted because the plaintiff failed to make an adequate evidentiary showing. Rather than appeal, the plaintiff served the defendant again on the same cause of action. The court ruled on the defendant's motions to dismiss as follows:

> "Defendant argues first that the judgment for the defendant in the December action bars the present action. It appears that the plaintiff by failing to transfer his exception waived his exception to the adverse ruling on jurisdiction in the first action and allowed the case to go to judgment. The present action containing the same allegations as the first was brought on the day that judgment was entered against the plaintiff. The issue sought to be relitigated was the exact issue determined in the previous case. *It is in the 'interest of parties and the public that there be an end to litigation.' Parties are therefore directly estopped to relitigate matters actually litigated or admitted by the pleadings in a former suit.*
>
> The plaintiff is not necessarily barred from litigating his tort claim if he can obtain jurisdiction in another forum but he may not do so here against this defendant."

245 A.2d at 77 (citations omitted; emphasis supplied.)

The line of cases holding that *res judicata* bars relitigation of the issue of subject matter jurisdiction in a subsequent case is also instructive. *Stuhl v. Tauro*, 476 F.2d 233 (1st Cir. 1973); *Esterez v. Nabers*, 219 F.2d 321 (5th Cir. 1955); *American Hawaiian Ventures v. M.V.J. Latuharg*, 257 F. Supp 622 (D.N.J. 1966). And it has been held that *res judicata* precludes relitigation of a prior ruling granting a *forum non conveniens* motion. *Pasteuka v. Texaco, Inc.*, 420 F. Supp 541 (D.Del. 1976), *aff'd*, 565 F.2d 851 (3rd Cir. 1977).

It is evident, to use the language of the California Court in *MIB, Inc., supra*, that "(t)he causes of action alleged in the current complaint arise out of the same course of conduct as that complained of in the first (two) complaints." 80 Daily L.Jr. D.A.R. at 1441. Indeed, Summa does not challenge this proposition. It does, however, contend that the previous decision of this Court regarding jurisdiction lacks the requisite finality necessary to give it *res judicata* effect. Summa urges five points in support of its contention that this Court's determination regarding jurisdiction does not have the requisite finality: one, the order granting the motion to quash was not appealable; two, because mandamus is an "extraordinary proceeding" the scope of review of an order quashing service is not sufficiently broad; three, piecemeal appeals from every interlocutory order entered will result if this order quashing service is accorded *res judicata* effect; four, it would result in an unfair burden upon litigants; five, the policy of NRCP 54(b) would be decimated if the order quashing service were accorded *res judicata* effect. (Summa's Memorandum, p. 68-75.)

Regarding the first contention, it is, indeed, true that an order quashing service is not appealable.* It is clearly established by *Jarstad v. National Farm Union Prop. & Cas. Co.*, 92 Nev. 380, 552 P.2d 49 (1976), that an order quashing service of process is reviewable by petition for writ of mandamas. 552 P.2d at 51. Moreover, even though such an order is not appealable, it is certainly as "final" as possible, by virtue of the unique strict rules regarding general appearances which prevail in the State of Nevada, as is discussed below.

In regard to the second contention, it is immaterial to a determination regarding the finality of an order, whether the order is reviewable by appeal or merely by mandamus since, for purposes of determining *res judicata* effect, the question turns upon whether "further judicial action by the court rendering a judgment is *required* to determine the matter litigated.." Restatement of Judgments, Section 41, comment *a* (1942). Again, as is discussed below, it need merely be noted that an order quashing service of process is as "final" as possible, in this state.

In regard to the third and fourth contentions, wherein Summa raises the spectre of "judicial horribles" or multitudinous piecemeal appeals of interlocutory orders, it need only be noted that an order quashing service of process is substantially different from the run-of-the-mill interlocutory order because it results in a cessation of the litigation. Moreover, as Summa is well aware, the availability of the extraordinary remedy of

---

*Although Summa attempts to use to its advantage [Summa Memorandum, p.69] the ruling of *Jarstad v. National Farm. Union Prop. & Cas. Co.*, 92 Nev. 380, 552 P.2d 49 (1976), that no appeal lies from an order granting a motion to quash, it later, at page 72, lines 28-32, seeks to gain some advantage from the contention that an order quashing service *is* appealable. It has been clearly established by *Jarstad, supra*, however, that such an order is not appealable, although it is reviewable by mandamus.

mandamus has been closely circumscribed by the Supreme Court of Nevada and is not likely to be employed regarding "every interlocutory order." Indeed, Summa's contention that it may litigate jurisdiction for as long as it can produce new complaints would create a judicial horrible in and of itself — endless litigation — which *res judicata* is specifically designed to eliminate.

In regard to the fifth contention, it is readily apparent that according orders quashing service of process *res judicata* effect will not "do violence" to NRCP 54(b) because such an order is a very unique order by reason of this state's strict rules regarding general appearances. Moreover, Summa's reliance upon Rule 54(b) is obviously misplaced, since analysis of the policy of that rule indicates that its intent is merely to permit subsequent revision of run-of-the-mill interlocutory orders which are entered routinely as an action progresses; once an order quashing service of process has been entered, further proceedings in that action cease and there will be no further proceedings as to those defendants.

Summa cites a number of federal and other cases which have held that a mere order quashing service of process is not sufficiently "final" to be accorded *res judicata* effect. The basis of those cases, however, was that the successful defendants could take the additional step of causing a dismissal of the action. Those cases are clearly inapposite since a non-resident defendant who succeeds in quashing service of process in Nevada may not take the additional step of causing dismissal of the action. *Consolidated Casinos Corp. v. L.A. Counter & Co.*, 89 Nev. 501, 515 P.2d 1025, 1027 (1973).

This Court's decision was as final a determination of the personal jurisdiction issue as is possible under Nevada procedure. After the June 8 decision and entry of the order quashing service of process, the issue of

personal jurisdiction over these defendants was ripe for appellate review by the vehicle of a petition for writ of mandamus. *Jarstad v. National Farm. Union Prop. & Cas. Co., supra.* The issues could never become more ripe for appellate review, for under Nevada law the *only* proper vehicle for appellate review of personal jurisdictional issues is by a petition for writ of mandamus. 552 P.2d at 51.

The test for determining whether the earlier proceeding is sufficiently "final" for *res judicata* effect to attach is described in the Restatement of Judgments, Section 41, comment *a* (1942), as follows:

> "a. *Finality of judgments.* For purposes of the rule stated in this Subject a judgment of law is not a final judgment if *further* judicial action by the court rendering a judgment is required to determine the matter litigated; and a decree in equity is not a final judgment if further action by the court is required beyond the supervision of carrying out the decree.
>
> An order of judgment of the court is not final if an issue of law or fact essential to the disposition of the action is reserved for judicial determination. . .
>
> Ordinarily the requirement of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for application of the rules of *res judicata.*"

This Court's order quashing service of process was sufficiently "final" to be a "basis for appellate proceedings" under the teaching of *Jarstad.* Moreover, there remained nothing more for this Court to do on the jurisdictional issue — all the necessary factual and legal determinations were made with respect to these defendants' motion to quash and nothing further could be done — not even the preparation by these defendants of an order of dismissal — without effecting a general appearance by these defendants. *Consolidated Casinos Corp. v. L.A. Caunter & Co., supra.*

The "finality" requirement has been met; the issue of personal jurisdiction of these defendants, upon the causes of action presented, has been determined and may not be relitigated in this Court. Indeed, if Summa's contentions are accepted, a non-resident defendant may be required in this state to repeatedly demonstrate his immunity to Nevada process by responding to repeated amended complaints, until expiration of the five-year rule of NRCP 41(e), the statute of limitations, or perhaps even longer, given a sufficiently litigious and well-funded plaintiff. This, indeed, would be an outrageous result.

4. Summa Must Prove By A Preponderance Of Evidence That Defendants Committed Tortious Acts In Nevada.

A. *NRS 14.065 Requires A Tortious Act In Nevada.*

NRS 14.065, relied upon by Summa in support of its assertion that this Court has jurisdiction over these moving defendants, was adopted by the Nevada Legislature in 1969. The constitutional, due process basis for the statute may be traced to a series of United States Supreme Court decisions including *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct 1228 (1958). In *International Shoe*, the Court stated:

> "(D)ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"
> 326 U.S. at 316.

* * *

C. Because of Significant Federal Constitutional Rights, Summa Must Prove Its Jurisdictional Facts By A Preponderance Of The Evidence.

Simple logic, application of federal cases in the context of Nevada rules regarding special appearances, and consideration of fundamental constitutional principles dictate that Summa's claim that it has but a "slight burden" to prove jurisdiction, by *prima facie* evidence, is erroneous.

It is true that in federal courts (and some state courts), a plaintiff's burden of proof upon the issue of personal jurisdiction is merely to show a *prima facie* case. But those same courts reserve the right to reverse an earlier finding of jurisdiction if, at the conclusion of a trial, the plaintiff has failed to show *by a preponderance of evidence* that the defendants are within the court's jurisdiction on the claims asserted. "Whatever degree of proof is required initially, a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence." *Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir. 1978). *See also, Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285-6 (9th Cir. 1977); and *Kaplin v. Thomas, Habb & Botts*, 219 N.E. 2d 646, 648 (Ill. App. 1966).

Unfortunately, this Court does not have the option of reconsidering its jurisdictional determination at the conclusion of the trial. For if a non-resident defendant participates in the trial, he makes a general appearance.

Another distinction between the procedures in other jurisdictions and Nevada is the availability of discovery. In Nevada, it would appear that a defendant who conducts discovery to obtain additional details regarding the jurisdictional allegations of a plaintiff might be found to have made a general appearance. *See* "Special Appearances: Trap for the Unwary," *Inter Alia*, pp. 16-17 (April 1978). In other jurisdictions,

however, discovery is available. *Data Disc Inc. v. Systems Technology Associates, Inc., supra*, 557 F.2d at 1285; *Barrett v. Bryant*, 290 N.W.2d 917 (Iowa 1980).

Thus, in Nevada, the better rule and seemingly the only rule which would give proper deference to the non-resident defendants' constitutional rights, is a rule that initially, the plaintiffs' burden to show jurisdictional fact is merely a burden to show such facts by a *prima facie* standard, but once controverted, the evidence offered by the plaintiff must be weighed against evidence adduced by the defendant and judged against a preponderance of evidence standard. This rule seems dictated by two undeniable constitutional propositions.

First, it is undeniable that a non-resident defendant has the due process right not to be subjected to the jurisdiction of a foreign state court except when justified under principles announced in *International Show Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199 (1957) and *Hansen v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958). *See, Certain-Teed Products Corp. v. Second Jud. Dis. Ct.*, 87 Nev. 18, 479 p.2d 781, 784-5 (1971).

Second, a state may not, through state-created rules ostensibly related to "procedure," create roadblocks to the exercise of those federally-protected constitutional rights. *Davis v. Wechsler*, 263 U.S. 22, 44 S.Ct 13 68 L.Ed. 143 (1923). In *Davis*, a state procedural rule akin to the special appearance rule prevailing in Nevada was applied so as to result in a waiver of venue objections. Justice Holmes, speaking for the Court, held the application of that state "procedural" rule to be an improper infringement of a federal right to change venue in certain railroad cases, stating:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when

> plainly and reasonable made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. * * * If the constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."
>
> 263 U.S. at 24-25.

See also, Central Union Telephone Company v. City of Edwardsville, 269 U.S. 190, 194-95, 46 S.Ct. 90 (1925); and *Michel v. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158 (1955); and 16 C. Wright & A. Miller, *Federal Practice and Procedure*, §4027 (1977).

The appropriate rule thus appears to be the one implied in *Barret v. Bryant, supra.* If the plaintiffs' effort to satisfy the requisite factual jurisdictional showing by a *prima facie* standard is controverted by evidence adduced by the defendants, a court must weigh the evidence presented by the plaintiff and defendant and determine whether, upon a preponderance of the evidence standard, a sufficient factual showing has been made to justify the exercise of jurisdiction over non-resident defendants.

Indeed, it defies logic to suggest that a court may determine whether the activities of a non-resident defendant have a sufficiently substantial connection to the forum to justify the exercise of jurisdiction, without requiring that the finding be made by proof by a preponderance, upon a weighing of the proof. It cannot be rationally argued that a state court may handcuff itself by applying the *prima facie* standard, thereby disregarding the defendants' evidence and effectively determining federal rights on the sole basis of evidence adduced by the plaintiff. This is especially true in a case

like this where Summa's evidence is so inherently untrustworthy.

If the strict Nevada rule regarding special appearances is to be adhered to, then the procedure followed in determining the jurisdictional question must be adjusted to accommodate federal rights. The procedure followed in federal courts and courts of other states is to require the plaintiff to make his showing of jurisdiction by the time a final determination regarding jurisdiction must be made by the court — at the end of trial. Since the court's final determination under Nevada procedure occurs at the time of determination of a motion to quash, preliminary to trial, it necessarily follows that Nevada procedure must be adjusted so as to require a plaintiff to make his showing by a preponderance at that same time. If the procedure followed were one in which the defendants' final opportunity to contest jurisdiction rendered them nothing more than observors (because of utilization of the *prima facie* standard) the procedure *itself* would seem to be violative of the due process rights which the trial court is charged in the first instance to protect. Accordingly, it is manifest that the evidence adduced by the parties in this case must be weighed and the ultimate determination of personal jurisdiction made according to a preponderance-of-the-evidence rule.

We will demonstrate in the following sections of this memorandum that Summa has failed to prove that defendants committed any tortious acts in Nevada under any standard. Because Summa's Second Amended Complaint is far from explicit as to what "tortious acts" defendants committed in Nevada, it is difficult for defendants to frame an appropriate response. There is a dominant theme, however, presented in Summa's documents — that by virtue of Mr. Hughes' so-called drug use, he was mentally incompetent from 1973 on. Because that issue is so important to Summa, and the

ultimate decision by this Court, we deal in the next section (part 5) with Mr. Hughes' mental competency. We will establish in that section that the only admissable evidence presented to this Court leads to the unequivocal conclusion that Mr. Hughes was mentally competent and alert until the day he died. Thereafter, we will discuss the "conduct" which Summa claims gives rise to jurisdiction. Thus, part 6 establishes that there was no "conspiracy," no tortious conduct in Nevada, and that the innocent or neutral conduct of defendants (*i.e.*, obtaining a gaming license in Nevada) does not give rise to jurisdiction. In parts 7 and 8 we will show that there were no acts of waste, mismanagement or other improper conduct by any of the defendants.

* * *

DATED: August 27, 1980.

Respectfully submitted,

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* * *

[EXCERPT OF BRIEF]

IN THE

Supreme Court of the State of Nevada

Case No. 13012

FRANK WILLIAM GAY, LEVAR BEEBE MYLER, and JOHN MORRISON HOLMES, JR.,

Petitioners,

—vs—

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK: THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE; FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr.; WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr.; SUMMA CORPORATION; HUGHES AIR CORP., d/b/a Hughes Airwest; and HUGHES PROPERTIES, INC.,

Respondents.

PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

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5. These petitioners filed a motion to quash the service of process of the Second Amended Complaint on January 30, 1980. This was the third such motion filed by these petitioners. After obtaining extensions of time, Summa filed its opposition to these motions to quash on April 4, 1980. On February 27, 1980, Judge Goldman recused himself and this action was transferred to Department I of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, before the Honorable J. Charles Thompson, Judge presiding. The Respondent Court held a status conference on June 6, 1980, at which time, in view of developments in the federal court proceedings in California, it directed a temporary stay of all proceedings on the pending motions to quash, except for the completion of briefing on the issue of whether the Davis & Cox parties had waived Nevada and federal rights to quash the service of process by virtue of prior proceedings in the action. On July 8, 1980, the Respondent Court stayed all proceedings before it in deference to an injunction issued by the federal court in California. The Ninth Circuit thereafter temporarily stayed the federal injunction and, on August 7, 1980, the Respondent Court ordered petitioners to file reply memoranda and documents regarding the motion to quash on or before August 27, 1980. Petitioners filed their responsive documents on August 27, 1980. The response included, among other things, a reply memorandum. Although the reply memorandum is contained in the original records before this court, for convenience sake, a copy is filed herewith as Exhibit 2.

6. The matter stood submitted as of August 27, 1980. On November 7, 1980, the Respondent Court announced its decision in open court. Although the court did not issue a written decision, it explained its rulings at the hearing. A copy of the transcript of that hearing is filed herewith as Exhibit 3.

7. The Respondent Court ruled that the doctrine of *res judicata* or direct estoppel did not apply to Judge Goldman's decision of June 28, 1979. In so doing, the Respondent Court has permitted the issue of personal jurisdiction over these petitioners to be relitigated. This the Respondent Court did in violation of its mandatory duty to apply the doctrine of *res judicata* and direct estoppel and, in failing to apply these doctrines, has unduly and impermissibly impaired petitioners' federal due process rights in violation of the Supremacy Clause in Article VI of the United States Constitution.

8. The Respondent Court also permitted plaintiffs below to establish personal jurisdiction over these petitioners merely by establishing jurisdictional facts according to a *"prima facie"* burden of proof test, as opposed to a preponderance of evidence burden of proof. In so doing, the Respondent Court stated it was completely ignoring the affidavits and evidence presented by petitioners. That evidence established that the testimony and evidence presented by plaintiffs below was clearly untrustworthy, not believable, and false. By permitting plaintiffs below to establish jurisdiction by a *"prima facie"* test, and refusing to consider the evidence proffered by petitioners, the Respondent Court acted in excess of its jurisdiction and in derogation of a mandatory duty and unduly and unfairly impaired petitioners' federal due process rights in violation of the Supremacy Clause in Article VI of the United States Constitution.

II.
STATEMENT OF ISSUES PRESENTED

1. Whether the failure of the Respondent Court to apply the well-established doctrines of *res judicata* and direct estoppel to a prior adjudication which was made after a full hearing, on an identical motion, was in derogation of a mandatory duty.

2. Whether the failure of the Respondent Court to apply the well-established doctrines of *res judicata* and direct estoppel to a prior adjudication which was made after a full hearing, on an identical motion, unduly and unfairly impaired petitioners' federal due process rights in violation of the Supremacy Clause in Article VI of the United States Constitution.

3. Whether the failure of the Respondent Court to impose on plaintiffs a preponderance of evidence burden of proof, as opposed to a *"prima facie"* test, was in derogation of a mandatory duty and resulted in an attempt to extend these proceedings regarding petitioners in excess of Respondent Court's jurisdiction.

4. Whether the failure of the Respondent Court to impose on plaintiffs a preponderance of evidence burden of proof, as opposed to a *"prima facie"* test, unduly and unfairly impaired petitioners' federal due process rights in violation of the Supremacy Clause in Article VI of the United States Constitution.

5. Whether the Respondent Court acted without and in excess of its jurisdiction, and in derogation of a mandatory dury, in failing to quash service of process upon petitioners, where plaintiff below failed to show by a preponderance of all competent, believable evidence presented that petitioners committed a tortious act in the State of Nevada.

* * *

C. *Argument.*

1. *The Doctrine of Res Judicata (Direct Estoppel) Prohibits Summa from Relitigating the Issue of Jurisdiction Decided by Judge Goldman.*

After a full and fair hearing, Judge Goldman filed a well-reasoned, 28-page Decision granting petitioners' motion to quash. Almost a year and one-half later, Judge Thompson reheard the same issue but denied identical motions as to these petitioners, upon the third complaint filed by Summa in this action.

How many times should a defendant be forced to resist *in personam* jurisdiction? Summa has filed three complaints below and petitioners have filed three motions to quash. On the third try, Judge Thompson has held, while admittedly completely ignoring petitioners' affidavits and evidence, that these petitioners are subject to the jurisdiction of Nevada courts. This procedure is not only erroneous, in excess of the lower court's jurisdiction and in derogation of a mandatory duty, but also has the effect of depriving defendants of their federal rights. A vigorous, litigious, wealthy plaintiff need only persevere until some judge will finally accept its showing as *prima facie*.

The Second Amended Complaint presents the same claims as the original Complaint. Accordingly, Judge Goldman's previous determination that petitioners are not subject to *in personam* jurisdiction is dispositive and the jurisdictional issue may not be relitigated.* In short, under the doctrine of "direct estoppel" (which is described by Restatement of Judgments, Section 45,

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* Judge Goldman's decision notes, at page 26, that the court had carefully examined the complaint so as to address all causes of action, including those "which might be extricated from the complaint by dint of imagination..." The Second Amended Complaint merely adds more detail regarding the post-1972 activities (already the subject of the first complaint) and describes additional activities before 1972, none of which can be the basis of action against petitioners in Nevada.

comment *d* (1942) as a limited application of *res judicata*). Summa is barred from relitigating the issue of jurisdiction. (It must be emphasized that these defendants do not assert that the previous determination precludes Summa from pursuing the allegations of the complaint in an appropriate forum, where these defendants are subject to the court's jurisdiction, such as United States District Court for the Central District of California. It is merely their position that the issue of jurisdiction, having once been determined in this action, is not subject to continued relitigation, as Summa adds facts to its complaint from time to time.)

Indeed, the conclusion that Summa may not relitigate the issue of jurisdiction is supported by a number of cases, including a recent decision of the California Court of Appeals announced May 28, 1980. *MIB, Inc. v. Superior Court of Los Angeles County*, ____Cal. App.3d____, 80 Daily L.Jr. D.A.R. 1440 (Cal.App. 1980). That case is remarkably similar to the instant case. The plaintiffs contended that earlier quashing of service by the Los Angeles Superior Court and United States District Court for the Central District of California did not bar their later case, also commenced in the Los Angeles Superior Court. They claimed they had discovered new evidence, had pleaded new causes of action, and had added additional defendants. The lower court declined to accord the previous rulings *res judicata* effect but the Court of Appeals reversed and directed entry of a new order quashing the service of process.

In *MIB, Inc.*, as here, there had been no change in the defendant's relationship to the forum subsequent to the earlier decisions quashing service and the court concluded that even though the plaintiffs contended they had made a stronger showing based upon newly-discovered evidence and had pleaded new causes of action, the new complaint still alleged causes of action arising out of the same course of conduct as that

complained of in the earlier complaints. The court relied on Restatement of Judgments, Section 49, comment *b* (1942), which states:

> "(b) *Effect of judgment as to issues decided.* Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action."

The court in the *MIB, Inc.* case found it immaterial for *res judicata* purposes that the plaintiff had tried to make cosmetic changes in the complaint.

> "The causes of action alleged in the current complaint arise out of the same course of conduct as that complained of in the first three complaints. It is immaterial that the plaintiffs have embellished the present complaint to invoke legal theories not articulated in the earlier versions." 80 Daily Journal D.A.R. at 1441.

The Supreme Court of New Hampshire reached the same conclusion in *Archie v. Piaggion*, 245 A.2d 76 (N.H. 1968). The motion to dismiss for want of personal jurisdiction had been granted because the plaintiff failed to make an adequate evidentiary showing. Rather than appeal, the plaintiff served the defendant again on the same cause of action. The court ruled on the defendant's motions to dismiss as follows:

> "Defendant argues first that the judgment for the defendant in the December action bars the present action. It appears that the plaintiff by failing to transfer his exception waived his exception to the adverse ruling on jurisdiction in the first action and allowed the case to go to judgment. The present action containing the same allegations as the first was brought on the day that judgment was entered against the plaintiff. The issue sought to be

relitigated was the exact issue determined in the previous case. *It is in the 'interest of parties and the public that there be an end to litigation.' Parties are therefore directly estopped to relitigate matters actually litigated or admitted by the pleadings in a former suit.*

"The plaintiff is not necessarily barred from litigating his tort claim if he can obtain jurisdiction in another forum but he may not do so here against this defendant." 245 A.2d at 77 (citations omitted; emphasis supplied).

The line of cases holding that *res judicata* bars litigation of the issue of subject matter jurisdiction in a subsequent case is also instructive. *Stuhl v. Tauro*, 476 F.2d 333 (1st Cir. 1973); *Estevez v. Nabers*, 219 F.2d 321 (5th Cir. 1955); *American Hawaiian Ventures v. M.V.J. Atuharq*, 257 F.Supp 622 (D. N.J. 1966). And it has been held that *res judicata* precludes relitigation of a prior ruling granting a *forum non conveniens* motion. *Kosteuka v. Texaco, Inc.*, 420 F.Supp 541 (D.Del. 1976), aff'd, 565 F.2d 851 (3rd Cir. 1977).

It is evident, to use the language of the California court in *MIB, Inc., supra*, that "(t)he cause of action alleged in the current complaint arise out of the same course of conduct as that complained of in the first (two) complaints." 80 Daily L.Jr. D.A.R. at 1441. Indeed, in the lower court, Summa did not challenge this proposition. It did, however, contend that Judge Goldman's decision regarding jurisdiction lacked the requisite finality necessary to give it *res judicata* effect. Summa urged five points in support of its contention that Judge Goldman's determination regarding jurisdiction did not have the requisite finality: one, the order granting the motion to quash was not appealable; two, because mandamus is an "extraordinary proceeding" the scope of review of an order quashing service is not sufficiently broad; three, piecemeal

appeals from every interlocutory order entered will result if Judge Goldman's order quashing service were accorded *res judicata* effect; four, it would result in an unfair burden upon litigants; five, the policy of NRCP 54(b) would be decimated if the order quashing service were accorded *res judicata* effect.

Regarding the first contention, it is, indeed, true that an order quashing service is not appealable. It is clearly established by *Jarstad v. National Farm Union Prop. & Cas. Co.*, 92 Nev. 380, 552 P.2d 49 (1976), that an order quashing service of process is reviewable by petition for writ of mandamus. 552 P.2d at 51. Moreover, even though such an order is not appealable, it is certainly as "final" as possible, by virtue of the unique strict rules regarding general appearances which prevail in the State of Nevada, as discussed below.

In regard to the second contention, it is immaterial to a determination regarding the finality of an order, whether the order is reviewable by appeal or merely by mandamus since, for purposes of determining *res judicata* effect, the question turns upon whether "further judicial action by the court rendering a judgment is required to determine the matter litigated.." Restatement of Judgments, Section 41, comment *a* (1942). Again, as is discussed below, it need merely be noted that an order quashing service of process is as "final" as possible, in this state.

In regard to the third and fourth contentions, wherein Summa raised the spectre of "judicial horribles" of multitudinous piecemeal appeals of interlocutory orders, it need only be noted that an order quashing service of process is substantially different from the run-of-the-mill interlocutory order because it results in a cessation of the litigation. Moreover, as Summa is well aware, the availability of the extraordinary remedy of mandamus has been closely circumscribed by this court and is not likely to be employed regarding "every

interlocutory order". Indeed, Summa's contention that it may litigate jurisdiction for as long as it can produce new complaints would create a judicial horrible in and of itself — endless litigation — which the doctrines of *res judicata* and direct estoppel are specifically designed to eliminate.

In regard to the fifth contention, it is readily apparent that according orders quashing service of process *res judicata* effect will not "do violence" to NRCP 54(b) because such and order is a very unique order by reason of this state's strict rules regarding general appearances. Moreover, Summa's reliance upon Rule 54(b) is obviously misplaced, since analysis of the policy of that rule indicates that its intent is merely to permit subsequent revision of run-of-the-mill interlocutory orders which are entered routinely as an action progresses; once an order quashing service of process has been entered, further proceedings in that action cease and there will be no further proceedings as to those defendants.

Summa cited to the lower court a number of federal and other cases which have held that a mere order quashing service of process is not sufficiently "final" to be accorded *res judicata* effect. The basis of those cases, however, was that the successful defendants could take the additional step of causing a dismissal of the action. Those cases are clearly inapposite since a nonresident defendant who succeeds in quashing service of process in Nevada may not take the additional step of causing dismissal of the action. *Consolidated Casinos Corp. v. L.A. Caunter & Co.*, 89 Nev. 501, 515 P.2d 1025, 1027 (1973).

Judge Goldman's decision and his Order Quashing Service of Process were as final a determination of the personal jurisdiction issue as is possible under Nevada procedure. After the June 8 decision and entry of the order quashing service of process, the issue of personal

jurisdiction over petitioners was ripe for appellate review by the vehicle of a petition for writ of mandamus. *Jarstad v. National Farm Union Prop. & Cas. Co., supra.* The issues could never become more ripe for appellate review, for under Nevada law the only proper vehicle for appellate review of personal jurisdictional issues is by a petition for writ of mandamus. 522 P.2d at 51.

The test for determining whether the earlier proceeding is sufficiently "final" for *res judicata* effect to attach is described in the Restatement of Judgments, Section 41, comment *a* (1942), as follows:

> "a. *Finality of judgments.* For purposes of the rule stated in this Subject a judgment of law is not a final judgment if *further* judicial action by the court rendering a judgment is required to determine the matter litigated; and a decree in equity is not a final judgment if further action by the court is required beyond the supervision of carrying out the decree.
>
> "An order of judgment of the court is not final if an issue of law or fact essential to the disposition of the action is reserved for judicial determination. . .
>
> "Ordinarily the requirement of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for application of the rules of *res judicata.*"

The order quashing service of process was sufficiently "final" to be a "basis for appellate proceedings" under the teaching of *Jarstad.* Moreover, there remained nothing more for the lower court to do on the jurisdictional issue — all the necessary factual and legal determinations were made with respect to petitioners' motions to quash and nothing further could be done — not even the preparation by them of an order of dismissal — without effecting a general appearance. *Consolidated Casinos Corp. v. L.A. Caunter & Co., supra.*

The "finality" requirement was met; the issue of personal jurisdiction of these defendants, upon the causes of action presented, was determined and could not be relitigated in the lower court. Indeed, if Summa's contentions are accepted, a non-resident defendant may be required in this state to repeatedly demonstrate his immunity to Nevada process by responding to repeated amended complaints, until expiration of the five-year rule of NRCP 41(e), the statute of limitations, or perhaps even longer, given a sufficiently litigious and well-funded plaintiff. This, indeed, would be an outrageous result.

2. *Respondent Court Erred in Permitting Summa To Establish Personal Jurisdiction by a Mere Showing of "Prima Facie" Evidence.*

The Respondent Court refused to weigh, or even consider, petitioners' affidavits and other evidence. Rather, it held that a *prima facie* showing was sufficient. As stated by Judge Thompson:

> "Thus, once the complaint or the allegations in the complaint are controverted by affidavit, then the defendants' affidavits are to be disregarded; they disappear, and it's the plaintiff's prima facie showing that the Court must look to determine whether the burden of proof has been met in satisfying the long arm statute, or 14.065." Transcript of Hearing, November 7, 1980, page 4, lines 6-11, Exhibit 3 filed herein.

This ruling was critical to petitioners. It literally dealt a death knell to its opportunity for a fair hearing. Summa claimed below that a grand conspiracy existed among the defendants to take advantage of Mr. Hughes. A critical element in that charge was the bold assertion by Summa that Mr. Hughes was mentally incompetent. The *"prima facie"* case however, submitted by Summa in support of that serious charge was either inadmissible, untrustworthy, or plainly perjurious. The evidence

proffered by petitioners below to establish that Summa's *"prima facie"* case was built on completely untrustworthy and inadmissible evidence was summarily rejected by the Respondent Court — not on the merits of the evidence — but rather on the artificial guideline of the so-called *"prima facie" rule*, i.e., disregarded petitioners' evidence, for it disappears.

Such a result nullifies any possibility of a due process hearing. It guarantees that obviously false and perjurious testimony will suffice to impose jurisdiction on non-resident defendants.

Simple logic, application of federal cases in the context of Nevada rules regarding special appearances, and consideration of fundamental constitutional principles dictate that the Respondent Court's ruling that plaintiffs have but a "slight burden" to prove jurisdiction by *prima facie* evidence, is erroneous.

It is true that in federal courts (and some state courts), a plaintiff's burden of proof upon the issue of personal jurisdiction is merely to show a *prima facie* case. But those same courts reserve the right to reverse an earlier finding of jurisdiction if, at the conslusion of a trial, the plaintiff has failed to show *by a preponderance of evidence* that the defendants are within the court's jurisdiction on the claims asserted. "Whatever degree of proof is required initially, a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence." *Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir. 1978). *See also, Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285-6 (9th Cir. 1977); and *Kaplin v. Thomas, Habb & Botts*, 219 N.E.2d 646, 648 (Ill.App. 1966).

Unfortunately, Nevada courts do not have the option of reconsidering jurisdictional determinations at the conclusion of the trial. For if a non-resident defendant participates in the trial, he makes a general appearance.

Another distinction between the procedures in other jurisdictions and Nevada is the availability of discovery. In Nevada, it would appear that a defendant who conducts discovery to obtain additional details regarding the jurisdictional allegations of a plaintiff might be found to have made a general appearance. *See* "Special Appearance; Trap for the Unwary," *Inter Alia*, pp. 16-17 (April 1978). In other jurisdictions, however, discovery is available. *Data Disc, Inc. v. Systems Technology Associates, Inc., supra*, 557 F.2d at 1285; *Barrett v. Bryant*, 290 N.W.2d 917 (Iowa 1980).

Thus, in Nevada the only rule which would give proper deference to the non-resident defendants' constitutional rights, is a rule that initially the plaintiffs' burden to show jurisdictional fact is merely a burden to show such facts by a *prima facie* standard, but once controverted, the evidence offered by the plaintiff must be weighed against evidence adduced by the defendant and judged against a preponderance of evidence standard. This rule seems dictated by two undeniable constitutional propositions.

First, it is undeniable that a non-resident defendant has the due process right not to be subjected to the jurisdiction of a foreign state court except when justified under principles announced in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199 (1957) and *Hansen v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958). *See, Certain-Teed Products Corp. v. Second Jud. Dis. Ct.*, 87 Nev. 18, 479 P.2d 781, 784-5 (1971).

Second, a state may not, through state-created rules ostensibly related to "procedure," create roadblocks to the exercise of those federally-protected constitutional rights. *Davis v. Wechsler*, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed 143 (1923). In *Davis*, a state procedural rule akin to the special appearance rule prevailing in Nevada was applied so as to result in a waiver of venue objections.

Justice Holmes, speaking for the Court, held the application of that state "procedural" rule to be an improper infringement of a federal right to change venue in certain railroad cases, stating:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeatd under the name of local practice. ***The State courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right.*** If the constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." 263 U.S. at 24-25.

See also, Central Union Telephone Company v. City of Edwardsville, 269 U.S. 190, 194-195, 46 S.Ct. 90 (1925); and *Michel v. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158 (1955); and 16 C. Wright & A. Miller, *Federal Practice and Procedure*, §4027 (1977).

The appropriate rule thus appears to be the one implied in *Barrett v. Bryant, supra*. If the plaintiffs' effort to satisfy the requisite factual jurisdictional showing by a *prima facie* standard is controverted by evidence adduced by the defendants, the court must weigh the evidence presented by the plaintiff and defendant and determine whether, upon a preponderance of the evidence standard, a sufficient factual showing has been made to justify the exercise of jurisdiction over non-resident defendants.

Indeed, it defied logic to suggest that a court may determine whether the activities of a non-resident defendant have a sufficiently substantial connection to the forum to justify the exercise of jurisdiction, without

requiring that the finding be made by proof by a preponderance, upon a weighing of the proof. It cannot be rationally argued that a state court may handcuff itself by applying the *prima facie* standard, thereby disregarding the defendant's evidence and effectively determining federal rights on the sole basis of evidence adduced by the plaintiff. This is especially true in a case like this where Summa's evidence is so inherently untrustworthy.

If the strict Nevada rule regarding special appearances is to be adhered to, then the procedure followed in determining the jurisdictional question must be adjusted to accommodate federal rights. The procedure followed in federal courts and courts of other states is to require the plaintiff to make his showing of jurisdiction by the time a final determination regarding jurisdiction must be made by the court — at the end of trial. Since the court's final determination under Nevada procedure occurs at the time of determination of a motion to quash, preliminary to trial, it necessarily follows that Nevada procedure must be adjusted so as to require a plaintiff to make his showing by a preponderance at that same time. If the procedure followed were one in which the defendant's final opportunity to contest jurisdiction rendered them nothing more than observers (because of utilization of the *prima facie* standard) the procedure *itself* would seem to be violative of the due process rights which the trial court is charged in the first instance to protect. Accordingly, it is manifest that the evidence proffered by petitioners should have been weighed and the ultimate determination of personal jurisdiction made according to a preponderance-of-the-evidence rule.

3. *When Properly Reviewed, the Competent, Credible Evidence in the Record Readily Reveals that Petitioners are not Subject to the Jurisdiction of the Courts of this State in this Action.*

The ultimate question which was presented to the lower court — and which is now presented to this court — is whether the courts of this state may properly exercise jurisdiction over petitioners. This court, the Ninth Circuit Court of Appeals, the United States District Court for the District of Nevada, Judge Paul S. Goldman, and, now, Judge J. Charles Thompson, have all determined that a prerequisite to the exercise of jurisdiction over non-resident defendants, under NRS 14.065, is the commission within this state of a tortious act. *See Certain-Teed Products Corp. v. Second Jud. Dist. Ct.*, 87 Nev. 18, 479 P.2d 781, 784-5 (1971); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir. 1977); *H.M. Greenspun v. Del E. Webb Corporation, et al.*, U.S.D.C., Dist. of Nev., Case No. LV 76-223, RDF, entered February 27, 1978; Decision of June 8, 1979 (Exhibit 1 filed herewith); and Transcript of Decision, November 7, 1980 (Exhibit 3 filed herewith).

* * *

V.
CONCLUSION

For the reasons stated hereinabove, it is respectfully requested that this court issue a writ of prohibition restraining the Respondent Court from continuing the proceedings against petitioners herein, and that this court issue a writ of mandamus commanding the Respondent Court to vacate its order of November 13, 1980 denying petitioner's motions to quash service of summons, and enter a new and different order granting petitioners' motion to quash.

Respectfully submitted,

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and

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By Roger A. Wirth, Esq.
ROGER A. WIRTH, ESQ.
Attorneys for Petitioners

* * *

[EXCERPT OF BRIEF]

IN THE

Supreme Court of the State of Nevada

Case No. 13048

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr. (Deceased); SUMMA CORPORATION; HUGHES AIRCORP., d/b/a Hughes Airwest, and HUGHES PROPERTIES, INC.,

Petitioners,

—vs—

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE J. CHARLES THOMPSON, District Judge, Eighth Judicial District Court; HOWARD LORENZO ECKERSLEY; JAMES H. RICKARD; and WILBUR SUTTON THAIN, M.D.,

Respondents.

ON PETITION FOR WRIT OF MANDAMUS FROM THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

ANSWER, INCLUDING AUTHORITIES, AGAINST ISSUANCE OF WRIT OF MANDAMUS, OF REAL PARTIES IN INTEREST HOWARD LORENZO ECKERSLEY, JAMES H. RICKARD, AND WILBUR SUTTON THAIN, M.D.

(Names and addresses of attorneys continued on next page.)

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and

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ARGUMENT

I.

THE DOCTRINE OF RES JUDICATA (DIRECT ESTOPPEL) PREVENTS SUMMA FROM RELITIGATING THE ISSUE OF JURISDICTION DECIDED BY JUDGE GOLDMAN JUNE 8, 1979

These Respondents/Real Parties in Interest respectfully submit to the Court that Judge Goldman's decision and Order Quashing Service of Process in regard to Summa's complaint filed in this action, almost a year and one half before Judge Thompson reheard and decided the same issues, is dispositive. Because this question is fully addressed in the Petition for Writ of Mandamus filed by Petitioners Gay, Myler and Holmes in Case No. 13012, on December 3, 1980, at pages 13-20, it would appear unnecessary and inappropriate to repeat the discussion here. By this reference, Respondents/Real Parties in Interest respectfully incorporate that discussion herein, as though fully set forth.

II.

THE LOWER COURT PROPERLY FOUND THAT THE COURTS OF THIS STATE HAVE NO JURISDICTION OF THE CLAIMS ASSERTED BY SUMMA AGAINST HOWARD ECKERSLEY, JAMES RICKARD, AND WILBUR THAIN, M.D., BECAUSE SUMMA FAILED TO PRESENT TO THE COURT COMPETENT, CREDIBLE EVIDENCE THAT THEY COMMITTED A TORTIOUS ACT WITHIN THIS STATE.

A. NRS 14065 Requires the Commission of a Tortious Act Within the State of Nevada.

* * *

Here, it cannot honestly be contended that Mr. Rickard, Mr. Eckersley or Dr. Thain, in connection with interstate commerce, sent into Nevada an instrumentality which caused damage, such as the exploding water heater in *Gray*, attempting thereby to profit from the commercial enterprise. Instead, Summa argues that there were "effects" in Nevada by reason of their allegedly wrongful acts committed elsewhere, insofar as business properties in Nevada were not properly attended and suffered economic drain. This contention of jurisdiction based upon "effects" is several steps removed from *Gray*; if accepted, it would result in personal jurisdiction of non-resident defendants in every state in which a large corporation (such as Summa) does business, upon the premise that acts resulting in economic damage to the corporation inflict economic damage upon the business enterprises of the corporation wherever it does business.

D. *Because of Significant Federal Constitutional Rights Involved, Summa was Required to Prove Jurisdictional Facts by a Preponderance of the Evidence.*

As is adverted to in the Statement of Facts, *supra*, the voluminousness of the record in this matter is at least in part attributable to the basic inability of Summa to place before the court specific factual evidence upon which to base jurisdiction of the non-resident defendants. That is, if specific facts were available, Summa would not have been constrained to desperately reach out to so many potential sources to seek to establish those facts.

It is noteworthy that the lower court, after examining that voluminous record, and *totally disregarding* the contrary evidence provided by defendants (see Transcript, 11-7-80, page 4, lines 6-11), found that "The facts alleged as against Thain, Eckersley and Rickard are simply insufficient." (Transcript, 11-7-80, page 6, lines 31-32).

It is respectfully submitted that Judge Thompson erred in so disregarding the evidence adduced by the defendants below. It would appear unnecessary and inappropriate to repeat herein the argument and citations to authority found at pages 21-26 in the Petition for Writ of Prohibition and Writ of Mandamus filed herein by Messrs. Gay, Myler and Holmes, in Case No. 13012, which has been consolidated with this case. Suffice to say the substantial constitutional rights affected by Summa's attempt to subject the defendants to the jurisdiction of the courts of this state, given the rigid special appearance rules prevailing in this state, mandate that evidence adduced by defendants be considered and that the plaintiff be required to prove jurisdictional facts by a preponderance of the evidence. (In Addition to authorities cited in the Petition of Gay, Myler and Holmes, *see, Leasco Data Processing Equipment Corp. v. Maxwell*, 319 F.Supp. 1256, 1261, (S.D.N.Y. 1970) (cited by Summa at pages 56 and 58 of its argument). "In this motion to dismiss for lack of personal jurisdiction it is the plaintiff who shoulders the burden of proof, by a preponderance of the evidence.")

Such disregard of Respondents' evidence makes even more significant, however, the lower court's finding that Summa had failed to establish jurisdictional facts sufficient to subject Mr. Rickard, Mr. Eckersley, and Dr. Thain to the jurisdiction of the courts of this state. Judge Thompson obviously very carefully examined the spellbinding factual tale which Summa spun and, despite Summa's attempt to tie all of the defendants into this action by means of a common thread premised upon an alleged underlying "conspiracy" and alleged ultimate "effects" in this state, he properly saw that what Summa is truly suing upon are causes of action which (if they arose at all) arose only elsewhere, long after Mr. Hughes departed the State of Nevada. Summa failed to show to the court any competent, credible evidence that these Respondents/Real Parties in Interest

committed any overt, wrongful acts in Nevada. Analysis of the complaint, Summa's written argument before this Court, and the twenty pounds of documents and transcripts they provided the lower court readily discloses that the allegedly actionable wrongful conduct in each instance occurred elsewhere than in this state.

E. *Summa Failed to Establish Jurisdictional Facts as to Each Defendant, Individually, on Each Claim for Relief.*

As both Judge Goldman and Judge Thompson ruled, Summa may not "bootstrap" jurisdiction of the defendants upon all claims asserted on the mere basis of properly asserted jurisdiction of *certain* (but less than *all*) of the claims asserted against *certain* (but less than *all*) of the defendants. As Judge Goldman stated, "NRS 14.065(2) and (3) clearly contemplate that the assertion of jurisdiction *as to each cause of action* between the same parties must be *independently established.*" (Decision, June 8, 1979, page 8). Judge Thompson similarly noted that "jurisdiction over each co-conspirator must be independently established." (Transcript, 11-7-80, page 5, lines 8-9).

* * *

EXCERPT OF TRANSCRIPT

CASE NO. A 185995
DEPARTMENT TEN

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of HOWARD ROBARD HUGHES, JR., (Deceased) WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes Jr., (Deceased); SUMMA CORPORATION, Hughes Air Corp., d b/a Hughes Air West and HUGHES PROPERTIES, INC.,

Plaintiffs,

—vs—

FRANK WILLIAM GAY; CHESTER C. DAVIS, NADINE HENLEY MARSHALL; DAVID & COX; a Partnership, MAXWELL E. COX, HOWARD M. JAFFE; D. MARTIN COOK; KAY GIBBONS GLENN; LEVAR BEEBE MYLER; JOHN MORRISION HOLMES, JR.; CLARENCE ALBERT WALDRON; HOWARD LORENZO ECKERSLEY; JAMES H. RICHARD; WILBUR SUTTON THAIN, M.D.; HOMER HONE CLARK, M.C.; NORMAN FRANCIS CRANE, M.C.; JOHN DOES I-VI; AJAX CORPORATIONS I-VI; and ABLE & BAKER PARTNERSHIPS I-VI,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE PAUL S. GOLDMAN, DISTRICT JUDGE

TUESDAY, NOVEMBER 20, 1979, 9:00 A.M.

* * *

THE COURT: Anything further?

MR. WIRTH: Only insofar as the point which these fees are awarded. I think the question presented today is whether the Amended Complaint will be permitted to be filed. I think this is the point, that we should get over that hurdle and not someplace down the road. I respectfully submit, I think it is a matter of examination, cross-examination, so on and so forth in my experience with this court.

MR. SMITH: I am perfectly willing to submit to the court a detailed affidavit of the hours spent in general subject matters of research and areas of affidavit preparation, together with billing rates and that kind of information.

THE COURT: Well, here we go. I grant the motion for leave to file and another Amended Complaint is going to have certain conditions.

Number one, is that the Amended Complaint to be filed will conform to the proposed Amended Complaint together with a list of typographical corrections exhibited to the court today. That will be accomplished within the next ten days.

Secondly is that the condition as each defendant as represented by Mr. Wirth and Mr. Smith will be compensated up through a maximum of $3,500 per defendant; that it is, however, conditioned upon submission to the court and to opposing counsel an affidavit of hours expended and the customary hourly rate as pertains to this case.

Finally, no further amendments will be granted unless upon extraordinary cause -- not just good cause, but extraordinary cause. I can't conceive of a situation, Mr. Echeverria, that leave will be further granted. I suppose it is possible, but not likely.

Finally, all briefing schedules heretofore set under various motions to quash and so on are all vacated. I am

aware that counsel have been accomodating to each other and to the court with a delicate situation in setting down the briefing schedules. I hope that will continue. I simply await new schedules to be submitted by counsel. All current dates are, of course, vacated.

Mr. Echeverria, just in terms of observation. I take as well taken Mr. Smith's point that certain evidentiary matters are exactly that and I know there might have been some confusion when the matrix of the Complaint was spoken about. If your discovery or purging of these files should reveal evidentiary matters, they may be just that, but not matters of the pleading.

I'm saying, I will allow you leave to amend under extraordinary circumstances, not just good cause. I think the theory should be clear to everybody now. At least I hope.

MR. ECHEVERRIA: If a new cause of action arises —

THE COURT: It may well. I don't know. It would have to be extraordinary. Anything else?

MR. WIRTH: No, Your Honor.

THE COURT: Affidavit of times and hours expended say within the next ten days, would that be satisfactory? You will have an opportunity to examine those, cousel.

MR. ECHEVERRIA: Thank you, Your Honor.

* * * * *

ATTEST: Full, true and accurate transcript of proceedings had.

DEBBIE F. BARTLETT, C.S.R. No. 62

* * *

(Excerpt of Decision)

CASE NO. A 185995
DEPT. NO. X
DOCKET "K"

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of HOWARD ROBARD HUGHES, JR., (Deceased), WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of HOWARD ROBARD HUGHES, JR., (Deceased), and Texas Temporary Co-Administrator of the Estate of HOWARD ROBARD HUGHES, JR., (Deceased), SUMMA CORP., HUGHES AIR CORP., dba Hughes Airwest, and HUGHES PROPERTIES, INC.,

Plaintiffs,

DECISION

VS.

FRANK WILLIAM GAY, CHESTER C. DAVIS, DAVIS & COX, a Partnership, KAY GIBBONS GLENN, LEVAR BEEBE MYLER, JOHN MORRISON HOLMES, JR., CLARENCE ALBERT WALDRON, HOWARD LORENZO ECKERSLEY, JAMES H. RICKARD, GEORGE ARTHUR FRANCOM, JR., WILBUR SUTTON THAIN, M.D., HOMER HONE CLARK, M.D., and NORMAN FRANCIS CRANE, M.D.,

Defendants.

APPEARANCES OF COUNSEL

FOR PLAINTIFFS:

ECHEVERRIA & OSBORNE
By: Peter Echeverria (Reno, NV)
and
ANDREWS, KURTH, CAMPBELL & JONES
By: Paul E. Harris (Houston, TX)
and
FITZGIBBONS, BEATTY & PHILLIPS
By: Thomas D. Beatty (Las Vegas, NV)

. . jurisdiction. Cf. *Wells Fargo & Co., v. Wells Fargo Express Co., supra*, at 430, n.24 (9th Cir. 1977). Thus a Nevada court may not put the jurisdictional facts to the test by an evidentiary hearing to allow a determination under a higher standard of proof, *i.e.*, a preponderance of the evidence.

Because available proof is limited to affidavits and the like, the Court must, and does, accept as true the affidavit of Mr. Winn. In *Data Disc, Inc., v. Systems Technology Associates*, 557 F.2d 1280 (9th Cir. 1977) the Court held:

> . . .if a plaintiff's proof is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction. *Id. at 1285.*

This Court has no authority to allow discovery or an evidentiary hearing when the facts bearing on the question of jurisdiction are controverted. See, *Data Disc, Inc., supra*, p. 1285, n.l. If the Court were to allow contradictory evidence to serve as the basis for denying jurisdiction, every out-of-state defendant could easily escape from the long-arm of Nevada Courts. Therefore, the Court of its own notion must strike from its consideration contradictory portions of the opposing affidavit. The Court does so recognizing that:

> Because there is no statutory method for resolving this issue (jurisdiction), the mode of its determination is left to the trial court. *Id. at 1285.*

Here, the uncontradicted portions of the Winn affidavit arguably make a showing of jurisdictional facts. The affiant incorporates bills, statements, checks, etc. obtained from the defendant's expense voucher file.

* * *

The affidavit of Paul B. Winn also fails to establish a sufficient showing that the assertion of personal jurisdiction over the defendant Davis on the other "breach of corporate fiduciary duty" claims is not sufficient for the same reasons set forth in the earlier discussion of the motions of Gay, *et. al.* As counsel notes (at page 15 of the Reply Points), there is no competent evidence demonstrating that the representatives' forum activities "were perpetrated in violation of (their) fiduciaty dut(ies) to the principal and in furtherance (their) individual interest(s)."

As to any and all other causes of action which might be extricated from the complaint by dint of imagination, the defendants Motions to Quash are granted.[8]

The motions of defendants Chester C. Davis and Davis & Cox are therefore granted as to all causes of action.

III.
MOTION FOR A MORE DEFINITE STATEMENT (DEFENDANTS GLENN AND WALDRON)

The Court Believes that the complaint is not sufficiently unintelligible to preclude a response. The Court adopts the reasoning and authority set forth in "Plaintiffs' Points and Authorities in Opposition to Defendants Glenn's and Waldron's Motion for a More Definite Statement." Although it does not speak well of notice pleading to allow a complaint of this nature to stand in its present form, the law is clear and this Court feels bound to follow it. Another Rule 12 motion might have been more appropriate.

The Motions of both defendants are therefore denied.

DATED THIS EIGHTH DAY OF JUNE, 1979.

PAUL S. GOLDMAN
District Judge

[8]The Court has established in its discussion of Dr. Thain's Motion that the requirements of the statute as to each cause of action must be independently established.

[EXCERPT OF APPENDIX TO BRIEF]

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVIS and COX, a partnership,
Plaintiff-Appellee,

vs.

SUMMA CORPORATION, a Delaware corporation,
Defendant-Appellant.

MEMORANDUM

SUMMA CORPORATION; HUGHES AIR CORPORATION d/b/a HUGHES AIRWEST; and HUGHES PROPERTIES, INC.,
Counterclaimants-Appellants,

vs.

DAVIS and COX, a partnership; MAXWELL E. COX; HOWARD M. JAFFE; D. MARTIN COOK; CHESTER C. DAVIS; FRANK WILLIAM GAY; LEVAR BEEBE MYLAR; JOHN MORRISON HOLMES, JR.; HOWARD LORENZO ECKERSLEY; JAMES H. RICKARD; WILBUR SUTTON THAIN, M.D.; and NORMAN FRANCIS CRANE, M.D.,
Counterdefendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge Presiding
Submitted November 5, 1980

Before: CHAMBERS and ALARCON, Circuit Judges, and LARSON*, District Judge

Davis and Cox filed this action in the United States District Court for the Central District of California to recover legal fees and costs allegedly owed to them by Summa Corporation. Summa, along with Hughes Air Corporation and Hughes Properties, Inc. ("Summa"), then filed a counterclaim, naming Davis and Cox, Maxwell Cox, Howard Jaffe, D. Martin Cook, Chester Davis, Frank Gay, Levar Myler, John Holmes, Jr., Howard Eckersley, James Rickard, Wilbur Thain, M.D., and Norman Crane, M.D. as counterdefendants. Some of the counterdefendants are attorneys and businessmen who served on the Board of Directors of Summa and other Hughes companies and who, along with the late Howard R. Hughes, Jr. — the sole stockholder — controlled the affairs of the Hughes companies until Hughes' death in 1976. The remainder of the counterdefendants are legal advisors, aides, and doctors who worked for Summa. Several of them served primarily as personal attendants to Hughes until his death. The counterclaim concerns a series of allegedly improper activities which occurred during the ten-year period prior to Hughes' death. After Hughes' death, controlling interest in Summa and other Hughes companies passed, at least temporarily, to Hughes' intestate heirs. The allegations in the counterclaim are very similar to those in a complaint filed earlier in a state court in the State of Nevada. That action is currently pending.

Subsequent to the filing of the counterclaim in this action, the counterdefendants moved to dismiss the action under Rule 9(b) of the Federal Rules of Civil Procedure for failure to plead fraud with sufficient particularity. Before the court ruled on the motion, Summa filed an amended counterclaim, removing the fraud claims that were alleged in the original

*Honorable Earl F. Larson, United States Senior District Judge for the District of Minnesota, sitting by designation.

counterclaim. The district court then granted counterdefendants' motion dismissing the counterclaim without prejudice. Summa then filed a second amended counterclaim, and the district court again dismissed the counterclaim for failing to comply with Rule 9(b). The second dismissal, however, was with prejudice and was entered pursuant to Rule 12(b)(6) and Rule 41(b).[1] This order was then entered under Rule 54(b) as a final judgment of dismissal against Summa.

To protect this final judgment, the district court later issued an order enjoining Summa from further pursuing the similar state action that was earlier filed in Nevada. The order was stayed pending this appeal by a three-judge panel of this Court on July 30, 1980.[2] Summa appeals both the order directing final judgment of dismissal of the second amended counterclaim and the order enjoining Summa from pursuing the Nevada action. For the reasons stated below, we disagree with the orders of the district court and, accordingly, we reverse.

Count One of the second amended counterclaim alleges that the counterdefendants conspired to gain control of Hughes' corporate and personal assets, and once they were in control, they misappropriated those assets for their personal benefit. This claim is grounded on breach of the fiduciary duties owed to Hughes, and breach of implied contractual duties of fairness and good faith. Counts Two and Three claim that excessive employment and consulting contracts for the counterdefendants were entered into and approved of in breach of fiduciary duties owed to Hughes and Summa. Count Two alleges that the directors of Summa approved their own contracts and Count Three alleges that the contracts were approved pursuant to the conspiracy. Count Four claims that the counterdefendant directors are liable for acts of waste, mismanagement, and negligence performed in

connection with their operation of Summa. The claim is grounded on breach of fiduciary duties. Count Five is directed toward the attorneys and primarily alleges legal malpractice and breach of the fiduciary and implied contractual duties owed to Hughes and Summa. Count Five also alleges that the attorneys' actions were part of the conspiracy.

The judgment of a district court in dismissing an action under Rule 41(b)[3] should be reversed only where it is apparent that the court abused its discretion. *Schmidt v. Hermann*, 614 F.2d 1221, 1224 (9th Cir. 1980); *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). *See* 9 Wright & Miller, *Federal Practice and Procedure: Civil* §2376 at 248-49 (1971). This court has earlier interpreted that standard to mean that the district court should not be overturned unless there is "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Anderson*, 542 F.2d at 524.

Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The particularity rule for fraud claims is an exception to the simplified general federal pleading requirements,[4] and thus "its scope of application should be construed narrowly and not extended to other legal theories or defenses." 5 Wright & Miller, *Federal Practice and Procedure: Civil* §*1298 (1969). The level of particularity demanded by the rule is not inflexible and depends to a large extent on the type of theory under which a cause of action is brought, the facts of a particular case, and the circumstances pleaded. See* 5 Wright & Miller, *Federal Practice and Procedure: Civil* 1298 (1969); 2A J. Moore, *Federal Practice* §9.03 (1979). The primary purpose of the rule is to identify "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Walling v. Beverly Enterprises*, 476 F.2d 393 397 (9th Cir. 1973).

In its original counterclaim, Summa appeared to have based much of its cause of action on fraud. However, after counterdefendants raised the Rule 9(b) issue by motion, Summa amended its counterclaim and dropped its initial averments of common law fraud. Fraud is also not mentioned in the second amended counterclaim. Counterdefendants claim that Summa dropped the reference to the word "fraud" merely to avoid compliance with Rule 9(b) and that the amended counterclaims are in all respects identical to the original counterclaim which alleges a scheme to defraud Howard Hughes and his companies.

It is true that "fraud" is a matter of some indefinite character, and that it is often difficult to deduce. The elements of a common law fraud claim are, on the other hand, well-defined. They include: "(1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive, (5) with action taken in reliance upon the representation." *Pence v. United States*, 316 U.S. 332, 338 (1942) (quoted in *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976)). *See also Crocker-Citizens National Bank v. Control Metals Corp.*, 566 F.2d 631, 636 (9th Cir. 1977) (applying common law fraud claim under California law). It is the penumbral area surrounding common law fraud, however, that is more difficult to define for the purposes of Rule 9(b).

A complaint alleging a breach of fiduciary duty or a breach of the implied contractual duty of good faith toward an individual or a corporation may or may not allege fraud depending on the underlying conduct involved. *See United States v. Kearns*, 595 F.2d 729 (D.C. Cir. 1978); *Robison v. Caster*, 356 F.2d 924 (7th Cir. 1966). In many of these cases in which Rule 9(b) is found to be applicable, the claim is either one in which statutory fraud is claimed, *see Walling v. Beverly Enterprises*, *supra*, one in which the elements of

common law fraud are directly pleaded, *see Crocker-Citizens National Bank v. Control Metals Corp., supra*, or one in which the claimant has admitted that fraud is being averred. *See Robison*, 356 F.2d at 925. In such cases the difficult question of whether fraud is alleged if precluded. Summa's second amended counterclaim alleges claims of conspiracy to gain control of Hughes' assets, misappropriation of those assets, waste and mismanagement, and legal malpractice. Rather than basing these claims on the type of misrepresentation that constitutes common law fraud, Summa has chosen to pursue a theory of undue influence. Given the allegations concerning the physical and mental condition of Howard Hughes during this period, and his possible susceptibility to influence, we agree with Summa's belief that its allegations do not constitute a common law fraud claim.

To the extent, however, that Summa's allegations could be read to penetrate the ill-defined penumbral area surrounding common law fraud, we find that the counterclaim more than satisfies the dictates of Rule 9(b). Rule 9(b) must not be read to defeat the simple pleading requirements of Rule 8, *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), *cert. den.*, 421 U.S. 976 (1975); *In Re Equity Funding Corporation of American Securities Litigation*, 416 F.Supp. 161, 181 (C.D. Cal. 1976), nor may it be used to require the pleading of detailed evidentiary matter. *Walling*, 476 F.2d at 397; 2A J. Moore, *Federal Practice* §9.03 (1979). Although mere conclusory allegations will not satisfy the particularity requirement, *Schmidt*, 614 F.2d at 1224, identification of the circumstances constituting the alleged fraud are sufficient. *Bosse v. Crowell, Collier and Macmillan*, 565 F.2d 602, 611 (9th Cir. 1977). Whenever possible, the time, place, and nature of the activities should be pleaded. *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 886, 867 (9th Cir. 1977);

Walling, 476 F.2d at 397. A description of the "bare bones" of an alleged fraudulent scheme has been found to be a sufficient pleading under Rule 9(b). *See Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975).

Furthermore, courts have significantly relaxed the extent of the particularity requirement in certain factual circumstances. Less particular allegations of fraud have been found sufficient when insiders of a corporation possess relevant information about the circumstances that the claimants are unable to obtain. *Schlick*, 507 F.2d at 379; *Claidale Enterprises v. C.I. Realty Investors*, 423 F.Supp. 257, 259 (S.D. N.Y. 1976); *Denny v. Carey*, 72 F.R.D. 574, 580 (E.D. Pa. 1976), or when the fraud is directed against a third party. *Allegaert v. Perot*, 78 F.R.D. 427 (S.D. N.Y. 1978), or when the events encompassing the alleged fraudulent activity have happened over a lengthy period of time and there are many individuals involved. *In Re Equity Funding*, 416 F.Supp. at 181; *Temple v. Haft*, 73 F.R.D. 49, 53 (D. Del. 1976); *Serpa v. Jolly King Restaurants, Inc.*, 62 F.R.D. 626, 635 (S.D. Cal. 1974). In addition, the pleading of fraud by information and belief has been permitted when the facts supporting the belief have been detailed in the complaint. *Schlick*, 507 F.2d at 379; *Segal v. Gordon*, 467 F.2d 602, 608 (2nd Cir. 1972).

In its second amended counterclaim, Summa has set forth much more than conclusory allegations. It has included the time, place, and nature of many of the alleged wrongful activities, including those supported by information and belief. In other instances, it is readily apparent that Summa is unable to detail some of the circumstances since the information is peculiarly within the possession of the counterdefendants. The intensely guarded and somewhat unique nature of the operation of the Hughes companies prior to Hughes' death has undoubtedly exacerbated this problem for Summa. Furthermore, the period covered by the allegations

covers ten years ending in 1976, a lengthy period of time. We find that counterdefendants have been more than advised of the nature of the claim that they must answer, *see Walling*, 476 F.2d at 397, and that Rule 9(b), to the degree that it must be complied with, has been satisfied.

A dismissal on the pleadings with prejudice is a harsh remedy that "should only be invoked in extreme circumstances." *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). Summa has sufficiently pleaded its claims and must be allowed to proceed. The dismissal under Rule 41(b) and Rule 12(b)(6) was improper. If, as counterdefendants suggest, this is a claim brought solely to smear their reputations, any such lightly made claims can be disposed of by summary judgment after discovery. We express no view on the merits of Summa's counterclaim.

Since, in light of our decision, there is no longer a final judgment to protect, the district court injunction enjoining Summa from pursuing any similar action, including the Nevada state claim, must be reversed. *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286, 1316 (5th Cir 1971), *cert. den.*, 404 U.S. 1047 (1972). The stays pending this appeal that were ordered by this Court on July 30, 1980, and on July 31, 1980, in the actions *Gay v. Summa Corp.*, CV-79-02974-R, *Holmes v. Summa Corp.*, CV-79-2374-R, are also vacated.

Reversed and remanded.

FOOTNOTES

1. Rule 41(b) provides:
"For failure of the plaintiff to prosecute or *to comply with these rules* or any order of the court, a defendant may move for dismissal of an action or of any claim against him." (Emphasis added.)

2. Also stayed in that order were *Gay v. Summa Corp.*, CV-79-02974-R; *Holmes v. Summa Corp.*, CV-79-02973-R; *Davis v. Summa Corp.*, CV-79-2375-R. *Davis and Cox v. Summa Corp.*, CV-79-2374-R, was stayed by the court in a supplemental order issued on July 31, 1980.

3. The district court also dismissed Summa's counterclaim pursuant to Rule 12(b)(6). Since the standard of review of a Rule 12(b)(6) dismissal is considerably more liberal than that under Rule 41(b), *see Conley v. Gibson*, 355 U.S. 41, 45 (1957); *Walling v. Beverly Enterprises*, 476 F.2d 393, 395 (9th Cir. 1973), and we find that the district court's Rule 41(b) order was erroneous, it is unnecessary for us to discuss the Rule 12(b)(6) ground for dismissal.

4. *See* Rules 8(a) ("A pleading. . . shall contain. . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." and 8(e)(1) "Each averment of a pleading shall be simple, concise, and direct.").

5. Counterdefendants' assertion that Summa, in its original countercomplaint, admitted that it was averring fraud belies the fact that a party has considerable discretion to amend its complaint. See Rule 15(a), Federal Rules of Civil Procedure.

Chambers, Senior Circuit Judge

I concur in Judge Larson's Memorandum. He does not discuss the request that the case be remanded back to a different district trial judge. Impliedly the request is denied. I cannot bring myself to vote to order such a transfer, but the trial judge must be tired of this case. I am. I would hope he would pass it on to someone else.

IN THE

Supreme Court of the State of Nevada

CHESTER C. DAVIS, DAVIS & COX, a partnership, MAXWELL E. COX, HOWARD M. JAFFE and D. MARTIN COOK,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE J. CHARLES THOMPSON,

Respondents. No. 12808

FRANK WILLIAM GAY, LEVAR BEEBE MYLAR, and JOHN MORRISON HOLMES, JR.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE; FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr.,; WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr. and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr.; SUMMA CORPORATION; HUGHES AIR CORP., d/b/a Hughes Airwest; and HUGHES PROPERTIES, INC.,

Respondents. No. 13012

FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); WILLIAM R. LUMMIS, Nevada Co-Special Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased) and Texas Temporary Co-Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); SUMMA CORPORATION, HUGHES AIR COPR., d/b/a Hughes Airwest, and HUGHES PROPERTIES, INC.,

Petitioners,

v.s

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE J. CHARLES THOMPSON, District Judge, Eighth Judicial District Court; HOWARD LORENZO ECKERSLEY; JAMES H. RICKARD; and WILBUR SUTTON THAIN, M.D.,

Respondents, No. 13048

ORDER

Petitioners in cases No. 12808 and 13012, and respondent real parties in interest in case No. 13048, have moved for stays of remittitur pending applications for writs of certiorari in the United States Supreme Court. NRAP 41(b). The effect of staying remittitur, if notice is received by this court that petitions for writs of certiorari have been filed in the United States Supreme Court, would be to stay the effect of our decision in these consolidated cases until the matter is disposed of by the Supreme Court. We do not consider it appropriate to grant the stays requested in the absence of some showing similar to the showing required for issuance of a stay pending appeal in this court. *See* NRAP 8; *see also* Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948). This court has reviewed the papers on file in these original proceedings, and we do not perceive any serious or irreparable injury that will occur to the moving parties by denial of the stay; on the other hand, the plaintiffs in the court below may well be prejudiced by the passage of additional time before their cases are heard. On balance, we do not believe that any miscarriage of justice, *id.* at 17, 189 P.2d at 360, will occur by denial of a stay pending application for certiorari. Accordingly, the motions for stays pending applications for certiorari in cases No. 12808, 13012, and 13048 are denied.

It is so ORDERED.

BATJER, A.C.J.
MANOUKIAN, J.
MOWBRAY, J.

CC:
Hon. J. Charles Thompson, District Judge
Messrs. Lewis, D'Amato, Brisbois & Bisgaard
Messrs. Houston, Moran & Kennedy
Messrs. Jolley, Urga & Wirth
Messrs. Sheppard, Mullin, Richter & Hampton
Messrs. Echeverria & Osborne
Messrs. Fitzgibbons & Beatty
Messrs. Parson, Behle & Latimer
Loretta Bowman, Clerk

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

August 13, 1981

Terence M. Murphy, Esq.
48th Floor
333 South Hope Street
Los Angeles, California 90071

RE: Frank William Gay, et al. v.
Eighth Judicial District *Court of Nevada, etc., et al.*
A-111

Dear Mr. Murphy:

Your application for a stay in the above-entitled case, together with the response filed thereto, has been presented to Justice Rehnquist. The Justice has endorsed the following on the face of your application:

"Denied
WHR
8/12/81"

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By Katherine Downs
Assistant Clerk

rwk
cc:
Honorable J. Charles Thompson, Esq.
Peter Echeverria, Esq.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CV-LV-81-524-HEC
ORDER OF REMAND

FIRST NATIONAL BANK OF NEVADA, Nevada CoSpecial Administrator of the Estate of Howard Robard Hughes, Jr., (Deceased); et al.,

Plaintiffs,

vs.

FRANK WILLIAM GAY, CHESTER C. DAVIS, et al.,

Defendants.

This cause having come on for hearing on the Motion of Plaintiffs FIRST NATIONAL BANK OF NEVADA, et al., to remand to the Eighth Judicial District Court in and for the County of Clark, State of Nevada, and the Court having considered the memoranda in support of and in opposition to the Motion to Remand, and having heard the argument of counsel, and being fully advised, and it appearing to the Court that this case was improperly removed to this Court and that this Court is without jurisdiction under 28 U.S.C. §1441 et seq.,

WHEREFORE, IT IS HEREBY ORDERED:

1. That Plaintiffs' motion to remand is granted.

2. That the action is remanded back to the Eighth Judicial District for the State of Nevada, County of Clark.

3. That the Clerk of this Court shall mail a certified copy of this order to the Clerk of the Eighth Judicial District for the State of Nevada, County of Clark.

4. That the Eighth Judicial District for the State of Nevada, County of Clark shall proceed with this action henceforth.

Dated this 5th day of October, 1981.

Harry E. Claiborne
United States District Judge

Submitted by Peter Echeverria
of Echeverria & Osborne

* * *